Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

MARIAN K. AGNEW,

Petitioner,

v.

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION,

Respondent,

On Petition for a Writ of Certiorari To the Supreme Court of the State of Virginia

PETITION FOR A WRIT OF CERTIORARI

Marian K. Agnew
The Gloucester Apartments
1820 Park Avenue, Apt. 2
Richmond, Virginia 23220
(804) 359-8248

QUESTIONS PRESENTED

This case suggests that adverse possession, empowered by its Statutes of Limitation,[1] permitted the unconstitutional taking of Mrs. Agnew's property when it mechanically conveyed her property to a neighbor without the due process and equal protection from state action guaranteed by the U. S. Constitution to "insure domestic tranquility."

I. This Case Presents a perfect storm of fact and law to adjudicate whether state Statutes enabling adverse possession deprive citizens of 14th Amendment procedural due process protecting their property from unconstitutional state action.

II. The question of Federal law before this Court is whether the ancient possessory ownership doctrine of adverse possession must be declared unconstitutional because taking property without either procedural or substantive due process contravenes both the Bill of Rights and the Fourteenth Amendment and there are less drastic means for resolving property disputes.

III. When the Virginia Supreme Court endorsed the Circuit Court's interim summary judgment, holding that adverse possession by mistake and fraud was grounds for adverse possession, did it substantially depart from both established Virginia case law, and fail to respect the Virginia Rule 3.20,[2] when there were material facts genuinely in dispute.

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[1] Hereinafter "Statutes."

[2] VSCR Rule 3.20. "Summary judgment shall not be entered if any material fact is genuinely in dispute."

PARTIES TO THE PROCEEDINGS

The named Petitioner is MARIAN K. AGNEW, who retired from her Northern Virginia law practice in 1999, moved to Richmond and in 2001 purchased the Gloucester Apartments at 1818/1820 Park Avenue to renovate for her retirement home. Her property abuts that of:

The named Respondent, the SUSSEX CONDOMINIUM UNIT OWNER'S ASSOCIATION, 1814/1816 Park Avenue, ("Sussex") is an unincorporated association created for the purpose of bringing this action whose unlisted members are:

First floor (direct access to the garden):

Unit 1 - opposing counsel for Respondent, Senior Partner, largest Richmond law firm, ex Virginia Attorney General,

Unit 2 - Jeffery J. Rawn, Sussex condominium developer, builder of the Brick Wall located between the Gloucester and Sussex properties, and Barbara J. Rawn.;

Second and third floors (no direct garden access):

Unit 3 - Samuel Lee Parker, President of the Sussex Assn and signer of the Attested Complaint and Debra C. Parker;

Unit 4 - Elise W. Haskell;

Unit 5 - Lora E. Spiller, Secretary, Treasurer

Unit 6 - Robert L. and Jay Kaye Treganza.

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OPINIONS BELOW

The opinion of the highest state court to review the merits, the Virginia Supreme Court, appears at Appendix p. 2, and is unpublished. The date on which the Virginia Supreme Court decided my case was September 9, 2010. A copy of that decision appears at Appendix p. 3. A timely petition for rehearing was thereafter denied on November 15, 2010 and a copy of the Order denying rehearing appears at Appendix p. 2.

An extension of time to file the petition for a writ of certiorari was granted to and including April 14, 2011, on January 20, 2011 in Application No. 10A717.

The following opinions and Orders of the Richmond Circuit Court appear in the Appendix and are unpublished:

Letter Opinion, October 21, 2009, Appendix p. 4
Interim Order, November 12, 2009, Appendix p. 8
Final Order, February 3, 2010, Appendix p. 10
Letter Opinion denying Rehearing, February 2, 2010, Appendix p. 12.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

This Court's jurisdiction is invoked under 28 U.S.C. §2403(b) and shall be served on the Attorney General of Virginia.

STATUTES AND REGULATIONS INVOLVED

Both substantive and procedural due process, the principles mandating that government respect all legal rights owed to a person, originated in England's *Magna Carta,* John 1 (1225). The right to private possession of land also originated in England when the *Statutes of Westminister,* Edw. 1 (1275) *et seq.,* were enacted fifty years later. They are the seminal law, the contracts between government and its citizens that were incorporated into the 14th Amendment of the U.S. Constitution:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment directly conflicts with Virginia Code § 8.01-236, the Statute of Limitations for adverse possession, that deprived Mrs. Agnew of her property without due process and equal protection. It states in pertinent part:

> "No person shall make an entry on, or bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have first accrued to such person or to some other person through whom he claims. . . ."

The Circuit Court abused its discretion under VSCR Rule 3.20 (summary judgment) by ruling that there were no material facts in dispute after it declined to hear Mrs. Agnew's factual evidence.

STATEMENT

The petitioner and owner of the Gloucester Apartments, Marian K. Agnew,[1] was found guilty of trespass after the Circuit Court summarily ruled without hearing her proffered defense, evidence of permissive use, that operation of the fifteen year Virginia Statute of Limitations had adversely transferred permanent possession of her property, fenced by a large Brick Wall, to that of Respondent, Sussex Condominium Unit Owners Association,[2] eight years before she purchased it. The Court awarded the Sussex damages to replace a section of the Wall she had removed to enlarge her garden.

A. Background: Sussex Condominium developer, Jeffery Rawn, admitted that he built the Brick Wall on the Bass/Agnew property with Walter Bass' permission in 1978.

After Mrs. Agnew purchased the Gloucester Apartments in 2001, she noticed Lee Parker,[3] President, Sussex Condominium Assn., Inc.,[4] that the huge Brick Wall [5]separating their gardens, but located on her property, would eventually have to be removed. She gave the Sussex temporary permission to use her property and urged amicable resolution of the boundary issue.

Parker solicited explanations from both former property owners, Jeffery Rawn[6] and Walter Bass,[7]

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[1] hereafter, "Mrs. Agnew "
[2] hereafter, "Sussex "
[3] hereafter, "Parker."
[4] Sussex Inc corporate registration ended in 2005
[5] The Wall is 44 ft long, 6 1/2 feet high, its pillars are 13"square It added about 125 square feet of her property to the Sussex garden
[6] hereafter, "Rawn." He had moved to Chicago, Ill in 2000

and consulted an attorney, who evidently advised that the Sussex had taken Agnew's property by adverse possession since the Wall was built in 1978.[8] He responded, attaching a letter[9] from Rawn, the Sussex condominium developer who built the Wall, describing how he and Bass, had jointly planned and paid for the Wall and had it built without a survey of the property line:

> "the property line was the location of a decaying and unattractive fence that determined the back (north) and west side boundaries. I approached [the Basses] to enlist their cooperation, guidance and support regarding the Wall which would continue to be the mutual boundary." They agreed to share the cost, (50/50). "We also, jointly and mutually, decided to place the wall exactly where the former wooden fence was. Neither of us felt that a survey was necessary (emphasis added) since the wooden fence appeared to be the property line."

A month later, Bass wrote to Parker:[10]

> "I owned 1818-1820 Park Avenue, Richmond, Virginia during the 70's through the '90s. In the late 70s, Jeff Rawn, a next door neighbor, informed me that he had planned to build a brick wall between our properties. The wall was to be built between the Sussex and the Gloucester Apartment buildings. Jeff Rawn asked if I would be willing to pay half of the cost. I did, which was the neighborly thing to do."

[7] Hereafter, "Bass," Agnew's predecessor, former Gloucester Apts. owner,

[8] Parker letter to Agnew, 11/8/02 App. p 13.

[9] Rawn letter to Parker, 10/29/02 App p 15
The content of Rawn's Letter is not attested His signature is notarized

[10] Memo, Bass to Parker 12/6/02 App. p.17

Rawn's February Memo [11] repeats, "We simply agreed to build the wall where we built it, without having the line surveyed." (emphasis added)." "Walter Bass and I never entered into any easement agreement verbal or otherwise."

In February, 2003, Parker wrote that his attorney advised that "the Association had acquired fee title to the disputed strip of land in 1993 under the doctrine of adverse possession," because Rawn had not intended to claim Bass' property as his own."[12] From this time on, the Sussex claimed that Rawn's Wall construction on Bass' property was a mistake.

B. Agnew tried unsuccessfully for six years to settle the boundary dispute before she demolished part of the wall in June, 2008, to make her garden.

While Mrs. Agnew was preoccupied with apartment renovations, the Sussex tenants had contacted at least four attorneys but failed to find one to take their case.[13] They continued to seek counsel. Attorney, Cosby emailed the tenants, "I will say - if I were the judge, I'd throw this case out. (why not ask Webb or Stutts)"[14]

Rawn returned to his Unit No. 2 apartment from Chicago in 2005 and was assigned the task of negotiating with Mrs. Agnew. They consulted City zoning officials. Rawn had violated the City zoning law when he built the Wall. Therefore, selling it to

[11] Email, Rawn to Parker, 2/14/03 App p 17

[12] quoting *Hollander v. World Mission Church*, 255 Va. 440, 442, 498 S.E.2d 419, 421 (1998), a mistaken boundary case[12]

[13] Stutts, Cosby, Webb, Taylor, Sussex email traffic is in the Record.

[14] Id. email Spiller to Cosby, 4/16/08

the Sussex was not an option because lot sizes could not be changed. Rawn considered exchanging reciprocal easements. When Agnew offered to draft the deeds, the Sussex tenants demurred. [15]

When Rawn seemed open to the reciprocal easement solution, in Spring, 2008, Mrs. Agnew obtained a City Demolition Permit and notified him that she intended to remove the rear section of the Wall for her garden. He did not respond. Instead, he obtained an independent survey. It showed that both the location of the Brick Wall and property line depicted on Mrs. Agnew's Plat, were correct. By June, 2008, she had heard nothing more about adverse possession and presumed that the Sussex had agreed to settle. When time had come to plant her garden, Mrs. Agnew then had part of the rear section[16] of the Brick Wall demolished, replacing it with a high steel trellis fence on the real property line. In July, 2008, Rawn told her that the deal was off - that the tenants had refused to cooperate.

C. A month later, opposing counsel purchased persistently vacant Sussex Unit No. 1 for 40% less than its assessment. Three months later, he had an associate bring this case against Agnew for adverse possession and trespass, claiming that Rawn had mistaken the location the property line.

Rawn did not mention the fact that an old friend, prominent attorney and former tenant, had repurchased Unit No.1, the first-floor apartment adjacent to his that had been vacant for more than a

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[15] Id email, Haskell to Parker, 4/28/08

[16] About 4'x16', enough to make a three 4-square gardens

year. [17] Disclosure of litigation required by its Certificate of Resale had evidently intimidated prospective purchasers. In early September, 2008, Mrs. Agnew discovered his name on the Sussex email circulation list and contacted him. She also investigated his impressive credentials: senior partner, experienced tobacco trust litigator and former Virginia Attorney General. Hoping that Rawn would finally get persuasive legal advice to settle the Wall matter, she invited him to discuss the matter. He was genial, very intimidating and clearly not interested in resolving the matter.

He advised that she needed an attorney because she had demolished Sussex property and an unpleasant adverse possession action was a possibility. Referring to his twenty-year experience in the Virginia court, he volunteered his opinion that a 2004 Alexandria, Va. boundary dispute case involving a walkway between two townhouses, *Quatannens v, Tyrrell*, [18] was on point, that the location of the Wall was Rawn's mistake. Therefore, by law both the Brick Wall and her fenced property belonged to the Sussex.

Surprised, Mrs. Agnew replied[19] that the classic adverse possession defense was permissive use and that the Wall admittedly had been built with permission from both former owners. She advised that he ask Parker for their earlier correspondence and later gave him copies of her survey. She also gave him a complete file of her correspondence with the Sussex tenants, trying to settle the matter out of

[17] App. p 40 - Unit No.1, Richmond City Tax Records, admitted into evidence 01/18/11.

[18] *Quatannens v, Tyrrell* 268 Va. 360, 601, S E. 2d 616 (2004) defines the defense of permissive use

[19] Mrs Agnew retired from the practice of law in 1999

court.

Mrs. Agnew read the *Quatannens* case and obtained an opinion from her attorney.[20] After he obtained a copy of the original 1978 Sussex Condominium Plat from the Sussex tenant, he advised that Jeff Rawn clearly knew that the wooden fence was on the Bass parcel; and that if Bass had seen the Plat, he would not have agreed that the wooden fence was the property line. "It is likely that either Bass was mistaken or was tricked. Rawn's successor in title should not profit from the mistake (mistake by Bass) or trick."

Hoping to persuade the new tenant that the matter must be settled, in mid-September, Agnew sent him a Memo detailing the history of the Wall dispute to date and settlement options that she and Rawn had discussed with the City. Later, she gave him a drawing showing how joint landscaping would enhance both properties. In mid-October, Parker advised Agnew by email that the new tenant formally represented the Sussex.

1. Walter Bass makes a Statement: the Wall was jointly built and paid for 50/50 by both apartment owners.

In November, Mrs. Agnew sent Bass copies of both the 1978 Sussex plat and her own. He prepared an attested *Statement*[21] describing his agreement with Rawn when they built the Wall together.

> "Jeff approached me to enlist my cooperation in order to build a brick wall in the back yard on the boundary between my property (the

[20] Opinion, William L. Jeffries, Jr., Kane, Jeffries, Cooper & Janis LLP full text App p. 28.

[21] Bass *Statement*, 11/2008, App p. 18

> Gloucester) and his (the Sussex). We discussed the design and cost of the brick wall. I agreed to pay a portion of it."

He expressed his surprise and dismay at Rawn's trick:

> "I did not know until I recently received a copy of the survey plat of the Gloucester property and a copy of the [1978] survey plat...which... converted the Sussex to condominiums, that the brick wall was not built on the mutual boundary....[I]nstead, it was built entirely on the land of the Gloucester,..my property at that time...a complete surprise to me."
>
> He stated that Rawn had deceived him when he marked the place where the wall would be built, "I presumed that...the brick wall was to be built on our mutual boundary...." " I asked if he knew where the property line was located. He...marked the spot and insisted that was where it should be built [and] I assumed that he knew what he was doing...." Bass concluded that "it obvious that the wall belongs to Mrs. Agnew since it is completely located on her property."

In December, the newly-minted Sussex Condominium Unit Owners Association filed a Verified Complaint against Mrs. Agnew in four counts of adverse possession and trespass, signed by Parker. Counsel of record was an associate of the new Sussex' tenant.[22]

2. Mrs. Agnew's Answer: construction of the wall was a permitted use, built and paid for by both abutting property owners.

[22] Joshua Heslinga filed *The Sussex Condominium Unit Owners' Association v Marian K Agnew and the Marian K Agnew Revocable Trust*, Circuit Court of the City of Richmond, No. CL0-8005626

Mrs. Agnew disputed the alleged mistake, answering that Rawn had obtained Bass' permission and then tricked him; and that the Brick Wall was a joint effort between neighbors. She attached Rawn's 2002 letter, a copy of her Plat and Bass' attested Statement. She asserted that the Complaint was "not well grounded in fact and not warranted by existing law"[23], and brought for improper purposes of converting her property, harassment and unnecessary delay in completing renovation of her garden.

During spring, 2009, litigation progressed. The Sussex threatened sanctions Against Mrs. Agnew if she did not sign prejudicial Stipulations as to the facts. She refused and shut off their email.

D. Agnew's surveyor corroborates Bass' Statement that Rawn intended to trick him.

In April, 2009, Agnew contacted John Lester[24], the surveyor Rawn had hired to draw the 1978 Sussex Plat. Lester produced not only his original survey but also the original Field Notes.[25] His Affidavit[26] reveals that Rawn's 2002 letter[27] had intentionally misrepresented the location of the "decaying wooden fence." Lester's Notes also show that the "dilapidated" wooden fence was actually located 4.5 feet inside the Sussex property line, completely surrounding its garden. His Plat[28] also shows the line of an old wire fence located on the

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[23] Va. Code 8 01-271.1.

[24] hereinafter "Lester"

[25] App p 24 Field notes are the actual measurements taken on site from which the Plat is drawn

[26] Statement of John Lester and attached notes App. p 20.

[27] App p 15.

[28] App p 25

Gloucester property. Still there, it had also been drawn on a 1912 plat. This is the exact location of the inside (Sussex) face of the Brick Wall that extends its width, an additional foot, into Mrs. Agnew's property.

Lester also had saved Rawn's instructions proving that Rawn told him to draw the "Brick Fence, (to be completed)" on the property line. Lester then drew the Condominium Plat and gave it to Rawn. Rawn then built the Brick wall built on the wire fence line on Bass' property, not on the property line. A year later, Rawn filed the deceptive Plat with his Condominium Declarations. He thereby violated the criminal penalty provisions of the *1974 Virginia Condominium Act.*[29] None of Rawn's successors, including current Sussex tenants, knew that the Brick Wall that surrounded their garden was located on their neighbor's property because the plats they were given when they purchased their Units were fraudulent.

1. Bass revised his Statement.

In May, 2009, after Agnew sent Lester's Statement and notes to Bass, he finally understood exactly how Rawn had tricked him, and revised it.[30] Even though Rawn had insisted that he knew where that boundary was located, he did not show Bass the Sussex Condo plat:

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[29] Va Condominium Act § 55-79.103. Penalties. Any person who ... willfully in an application for registration makes any untrue statement of a material fact or omits to state a material fact shall be guilty of a misdemeanor and may be fined not less than $1,000 or double the amount of gain from the transaction, whichever is the larger but not more than $50,000, or he may be imprisoned for not more than 6 months; or both, for each offense.

[30] Bass Revised Statement, App p 29

> "It clearly shows the property line and the proposed location of the brick wall on the mutual boundary. It also shows a fence on my property near the eastern boundary." He added, "If Jeff had shown me the plat, I would have been comfortable with the plans because it shows 'a Brick Fence (not yet completed)' drawn on the mutual property line, as Jeff had stated when he asked me to pay for half the cost."

Although Bass did not remember the wire fence, probably covered with creeper, he did remember the wooden fence that ran from the rear corner of Rawn's building back toward the alley, probably five feet on the Sussex property that was shown on Lester's Notes. Bass concluded that, "I now understood that the 2001 Plat done for Mrs. Agnew showed that Jeff [Rawn] had the brick wall built in the same location as the eastern wire fence shown on the 1978 plat, not straddling the property line." He expressed his dismay: "I now believe that I had been deceived. At that time, I assumed that Jeff knew the importance of respecting boundary lines since he was a very experienced developer and banker."

2. Mrs. Agnew gave this information to the Sussex in discovery.

All of the documents described above were included in Mrs. Agnew's discovery responses, including the Rawn, Bass and Lester Affidavits, supporting her assertion that Bass gave Rawn unconditional permission to build the wall between their gardens and deceived him by refusing to have the property line verified by a survey.

E. The Sussex' Motion for Summary Judgment, claimed that there were no disputed facts.

As soon as the Sussex tenant made his appearance, he moved for partial summary judgment. Agnew filed a Motion to Dismiss. He successfully defeated her motions to add the Sussex tenants as necessary party plaintiffs, to compel production of privileged documents and responsive answers to interrogatories, her requests for depositions and quashed her witness *subpoenas deuces tecum*. Agnew objected vigorously. When Agnew filed Notice that she intended to call Lester as an expert witness, the Sussex demurred but did not formally object.

1. The Pleadings, Motions and Affidavits proved that there were disputed material facts.

At the October hearing on the Sussex motion, Opposing Counsel argued that *Quatannens* [31] permitted adverse possession by intentional mistake. It claimed that the Sussex had taken Agnew's property because it had owned and possessed it for the statutory period after the Brick Wall was built.

Agnew responded that Lemons, J. had reviewed the entire body of adverse possession law and had ruled *sua sponte* that permissive use at the outset of a trespass is an absolute defense. He had also specifically excluded intentional encroachment, trick, as antecedent, irrelevant and confusing. She stated that surveyor, Lester, would testify that Rawn had intentionally tricked Bass by building the Wall to enlarge his garden after Bass had trusted

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[31] *Quatannens v, Tyrrell*, 268 Va. 360, 601, S.E. 2d 616 (2004)

him to build it on the property line without a survey.

Rawn had also falsified the Wall's location on his condominium plat, thereby violating the criminal penalty provision of the 1974 Va. Condominium Act. She asserted that the contemporaneous facts would expose that fraud to prove not only that Rawn made no mistake, but also intentionally planned to trick Bass.

2. The Court declined to take Lester's testimony.

The Court commented that that it was unfamiliar with adverse possession: "In this court, we don't get many issues involving adverse possession. I can probably count on one hand that issue coming up in the many years I've been here." When Agnew called Lester to testify, opposing counsel objected and argued that it was procedurally improper to take testimony. [32] The Court then declined to hear Lester's evidence. However, it accepted Agnew's proffered evidence into the Record, [33] took the matter under advisement and dismissed the hearing.

F. In its Opinion Letter, the Court failed to mention Mrs. Agnew's permissive use defense, ruled that summary judgment was proper, and awarded Agnew's property to the Sussex by adverse possession as of 1994 (sic).

More than a month later, the Court's interlocutory Letter Opinion, awarded partial

[32] VSCR Rule 3 20 (Summary Judgment) does not foreclose testimony
[33] Rawn's letter, Affidavits from both Bass and Lester, with field notes, Sussex email traffic searching for attorneys, Richmond City Tax Assessment records are in the Record

summary judgment to the Sussex, ruling that the Brick Wall located in Agnew's garden was acquired by the Sussex through adverse possession in 1994.[34] It concluded that Rawn had been mistaken as to the location of the boundary line and that "any fraud that may have been involved was induced by a unilateral mistake."

It did not acknowledge Agnew's defense clearly shown in the Affidavits of both Bass and Rawn and substantiated by surveyor Lester: that the Brick Wall was built between the gardens of two apartment owners with permission of both parties and permissive use is an absolute defense to adverse possession.

The Interim Order[35] ruled that the fifteen-year Virginia Statute of Limitations had given possession of Gloucester property to the Sussex as of 1994 and that the case would go to trial only on the amount of damages Mrs. Agnew would pay for her trespass. Mrs. Agnew's Objections were overruled and her Motion to Reconsider was denied. Mrs. Agnew was finally permitted to take Rawn's deposition but only on the trespass issues.

G. By its pre-emptive pre-trial Order, sustaining the Sussex Motions, the Circuit Court virtually eliminated Mrs. Agnew's right to further due process: evidence showing that she could not and had not trespassed on her own property.

The Circuit Court's January 30, 2009, Order After Pretrial Conference [36] bootstrapped its

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[34] Letter Opinion, 10/21/09, App A, p 4 The 1994 date is incorrect; the statute tolled in 1993

[35] Order, 11/12/09, App. A, p 8

[36] Record 364-366.

November 3, 2008, interim ruling (that the Sussex had confiscated Agnew's property by 1994) to limit Agnew's evidence to the issues of trespass and damages. After receiving Mrs. Agnew's ten-page witness and Exhibit List, (Record, 397-403) the Sussex immediately moved *in Limine* to exclude nearly all of it, but most particularly testimony from surveyor Lester, as irrelevant and improper. Mrs. Agnew opposed and objected [37] that by virtually eliminating all her proffered evidence that would have proved her innocence, the court had denied her due process.

> "Mrs. Agnew hereby opposes and objects to further Sussex efforts to violate her right to due process by preventing introduction of truthful evidence conclusively showing that Agnew cannot and has not trespassed on her own property. Agnew asserts that she neither trespassed nor damaged Sussex property when she demolished part of an offensive brick structure deliberately built in 1978 on her predecessor's property and continuing in violation of the criminal provisions of the Virginia Condominium Act, § 55-79.103.

H. Mrs. Agnew objected that the Court's November 30, 2009, pre-trial Order After Pretrial Conference, [38] was not based upon good law, the presumption in its Interim Order that the Sussex had confiscated Agnew's property by 1994.

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[37] Full text, App p. 32 Defendants Opposition to Plaintiff's Motion in Limine, Defendant's Objection to Plaintiff's Motion in Limine Record 433-441.

[38] Record 364-366

By sustaining Sussex' Motions, bootstrapping the interim Opinion's presumption that the Sussex had confiscated Agnew's property by 1994 (sic), the Court limited Agnew's evidence to the issues of trespass and damages. The Court therefore virtually pre-empted Mrs. Agnew's right to further due process: it eliminated any chance she might have had to prove that she could not and had not trespassed on her own property.

1. Orders entered under VSCR Rule 1:13 denied Mrs. Agnew due process.

Under Rule 1:13, the Court has used its discretion unilaterally to file its Orders. By waiving Mrs. Agnew's right to enunciate her objections, exceptions and endorsements, it has demonstrated the Court's *per se* violation of her right to due process.

2. The Sussex moved *in limine* to exclude testimony from surveyor Lester, as irrelevant and improper.

After receiving Mrs. Agnew's ten-page witness and Exhibit List, (Record, 397-403) the Sussex immediately moved *in Limine* to exclude nearly all of it, but most particularly testimony from surveyor Lester, as irrelevant and improper. Mrs. Agnew opposed and objected[39] that by virtually eliminating all her proffered evidence that would have proved her innocence, the court had denied her due process.

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---

[39] Full text, Appendix C, Defendants Objection to Plaintiff's Motion in Limine,

evidence conclusively showing that Agnew cannot and has not trespassed on her own property. Agnew asserts that she neither trespassed nor damaged Sussex property when she demolished part of an offensive brick structure deliberately built in 1978 on her predecessor's property and continuing in violation of the criminal provisions of the Virginia Condominium Act, § 55-79.103."

I. Mrs. Agnew's trial was limited to trespass and damages. The Court ordered her to pay more than $5,000 to reconstruct the Brick Wall.

Surveyor Lester was again present and prepared to testify. After Opposing Counsel objected that his testimony would be irrelevant to the trespass issues remaining, the Court again refused to hear him. Sussex President Parker testified that the Sussex had never disputed that the wall was on Agnew's property and had never accused her of trespass. The index to Rawn's deposition substantiated that fact because the work "trespass" was never mentioned. Rawn admitted his extensive development experience, that he was familiar with surveys and knew how to read a plat. He excused his "mistake" by stating that similar encroachments were common in that historic area of Richmond.

The Court ruled that Mrs. Agnew had become an unintended trespasser when she demolished part of the Brick Wall and awarded the Sussex $5,095 in damages, $1,000 more than her estimate to replace the Wall. After the Final Order was entered, Mrs. Agnew filed Notice of Appeal. The Court refused to sign her Statement of Facts submitted with her Petition in violation of Supreme Court Rules and she objected again.

On September 9, 2010, the Virginia Supreme Court denied Mrs. Agnew's Petition for Certiorari that challenged both lower court decisions on grounds that the *Quatannens* permission analysis was not followed and that there is no Virginia precedent for adverse possession originating in intentional trick or fraud. Her Petition for Rehearing, denied on November 15, 2010, asserted that she had been denied constitutional due process when the Circuit Court summarily awarded adverse possession of her property to the Sussex without taking her factual evidence.

J. Mrs. Agnew noticed her intent to appeal to the U.S. Supreme Court at the January 18, 2011, hearing on the Sussex' Motion for Sanctions.

1. Richmond City Tax Records prove that opposing counsel had a personal pecuniary interest in this case.

Back again in Circuit Court, Opposing Counsel moved to sanction Mrs. Agnew $20,000 for his Attorney fees and to release funds Mrs. Agnew had posted to pay for damages to restore the Brick Wall. She responded that he had already personally profited simply by filing this case. His apartment assessment had increased approximately $169,000 when the defect of probable litigation was eliminated by settling the Brick Wall boundary issue. [40] When she moved his City Tax Assessment Records into Evidence, they were admitted.

Exhibit No.1,[41] in the is a certified copy of the

[40] See, Transcript, Hearing *Sussex Motion for Satisfaction of Judgment*, 01/18/11, p. 17-20.

[41] Filed with the envelope of Defendant's Exhibits in the Record

Richmond City Tax Assessment Record for opposing counsel's apartment, showing that it had been assessed at $419,000, although vacant for more than a year. In September, 2008, he purchased it for only $250,000, a 40% discount.[42] After Mrs. Agnew and the Judge examined Exhibit No. 1, it was admitted into evidence (Transcript 1-18-2011, pp.17, 18):

> Mrs. Agnew: ...[T]his is what he paid for it,..$250,000.... [T]he assessment in 2008 was $419,000, but he got it for $250,000. Then he went to the City and asked them to reduce the tax assessment because of the problem in the back yard, and they knocked it off $100,000 ...back to $318,000....[A]ll of a sudden, [this] case became a very lucrative thing for (Opposing Counsel). $170,000 was added to the value of his property when he filed it and maybe that is why this case appeared when it did."
>
> The Court: I see.
>
> Mrs. Agnew: Okay, I am submitting that.
>
> The Court: All right.
>
> Mrs. Agnew: I move that into evidence.
>
> The Court: All right.
>
> Mrs. Agnew: You asked me what happened.
>
> The Court: Well, I did.

2. Mrs. Agnew was sanctioned $200.

After the Court Admitted the City Tax Assessment Records into evidence, it sanctioned Mrs. Agnew $200 for wasting opposing counsel's valuable time. She has paid both the damages and

[42] See Certified Richmond City Tax Records, App. C p.39

sanction.

REASONS FOR GRANTING THE PETITION

A. This case presents a perfect storm of fact and law to adjudicate whether state Statutes of Limitations for adverse possession, conveying possession of paper-titled property to a trespasser at a time certain without the fair hearing required by procedural due process, have been unconstitutional since the 14th Amendment was enacted to protect civil rights in "life, liberty and property," from state action.

1. The Virginia Statute of Limitation:[43] how it conveyed possession of Mrs. Agnew's Brick Wall to the Sussex.

The Virginia Statute of Limitations for Adverse Possession is fifteen years. It designates a period deemed sufficient to settle ownership of property, regardless of recorded title, on the occupant who has been in open and continuous possession for that period of time. After it terminates, the paper title owner may not eject the trespasser.

The case at bar started in 1978 with a misdemeanor: a misrepresentation on the Sussex Condominium Plat of the prospective location of the "Brick Fence" on the Gloucester/ Sussex property line. It ended when the Court awarded possession of that same Brick Wall to the Sussex as of 1994 (sic), years before Mrs. Agnew purchased her property. The enabling statute connects these two events. The

[43] § 8.01-236. "No person shall make an entry on, or bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have first accrued to such person or to some other person through whom he claims...."

issue here is whether its mechanical operation violated Agnew's constitutionally protected right to procedural due process and equal protection under the 14th Amendment.

During the statutory period, the owner of record, Bass, could have ejected the Sussex had he known that when he gave Rawn permission to build the Brick Wall in 1978, Rawn was knowingly planning to locate it completely on his property. After the fifteen-year Statute had run, he no longer had that option. Years later, when he sold his property to Mrs. Agnew and she discovered the trespass, it was too late to eject the Sussex.

The Court ruled that when Rawn deliberately built the Wall on Bass' property, the Statute dispossessed Mrs. Agnew by 1994 (sic), fifteen years later, and nothing more was needed to vest the Sussex' claim to her property. Her property rights and those of the Sussex had been reversed and when she demolished part of the Wall in 2008, she trespassed and was liable for damages.

2. If the Statutes of Limitation for adverse possession violate constitutionally protected property rights, why are they still used to resolve disputed ownership of property?

In 1225, when his Barons exacted the promise from King John that no person would be stripped of his rights or possessions "except by the lawful judgment of his equals or the law of the land," procedural due process was enacted. When the English covenants[44] for protection of property and substantive civil rights were codified by the

founding fathers in the Constitution, the equally ancient notion of land ownership by possession, adverse possession and its Statutes of Limitation, also became part of property law in every state. The fact that the Statutes provided no procedural due process has remained unnoticed, hidden in plain view ever since because they were a cheap and practical way to resolve property disputes when there were few people and common land was plentiful. Many U.S titles originate in adverse possession. This case demonstrates that little has changed since the 18th Century: In Virginia a trespassing neighbor can still oust a legitimate owner by adverse possession when the fifteen-year Statute of Limitation prohibiting "entry upon land" ended.

3. Since adverse possession compromises regularity in conveyance, its unconstitutional enabling statutes must be declared invalid under the 14th Amendment.

Today, unoccupied common land is rapidly disappearing and possessory rights no longer serve their original purpose: a quick way to assign ownership to a possessor of property. Squatter's rights have become the vehicle for scavenging paper-titled property and what a property owner bought is not always what he got, so long as the Statutes are lawful. Increasingly sophisticated technology, GPS locators, computerized surveying equipment and microfiche records in the local courts have defined land ownership to within tenths of inches on paper, the plat. Conflicts arise when its accurate depiction is not staked out on the property. Where there are discrepancies, the paper

title/possession issue immediately becomes a dispute that adverse possession can no longer solve.

B. The Federal question here is whether the ancient possessory ownership doctrine of adverse possession has finally hit the Fourteenth Amendment Brick Wall that provides due process and equal protection for persons and their property from state power.

1. The ancient law of possession has conflicted with constitutional mandates for due process and equal protection s ince the Fourteenth Amendment was ratified.

Substantive due prccess, the principle that government must respect all legal rights owed to a person, originated in England's *Magna Carta,* in 1225. The right to private possession of land also originated in England when the *1275 Statute of Westminister* was enacted fifty years later. It substantively embraced the notion that serfs who fenced and labored on their own land were more productive. Livery of seisin, or conveyance of ownership, was a ceremony that occurred when the feudal landlord gave his tenant a piece of turf, a twig and sometimes a key.

Ownership of land by possession, predated modern conveyance practice for good reason: it was reasonably reliable: "What you saw was what you got." Property was well identified when its possessor had occupied and improved it by his labor, had been vigilant and had driven off encroachers. In 1662, the Virginia Assembly instituted the old English practice of requiring parish church wardens to assemble the landowners every fourth year to perambulate their property lines, renewing marks

by individual and collective memory.[45]

2.Paper title gradually replaced possession.

The necessity for agrarian possession, enunciated by John Locke, was later imported by Thomas Jefferson[46] to settle this country when there was a huge surplus of state-owned land originating in grants.[47] However, when possession alone became increasingly unreliable, i.e., grants were vague, boundaries marked by watercourses, house ruins, and trees were indistinct, a better way to notice ownership had to be found. Property lines were surveyed by pulling chains through the woods and measuring angles by hand compasses.[48] As a result, by the mid-nineteenth Century, the paper trail based on surveys recorded on Cadastral Maps,[49] title searches, deeds, and plats gradually became both the common and preferable method of public conveyance (tracing) and establishment of land ownership. However, possession still operated concurrently with paper where there were still vast tracts of unoccupied land underutilized and available for the taking.

Three hundred years later, population has grown, land values have appreciated and pressure

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[45] Brent Tartar, *Bacon's Rebellion, the Grievances of the People, and the Political Culture of Seventeenth Century Virginia* Virginia Magazine, Vol 119, No 1, p 2.The Virginia Historical Society,

[46] Jefferson urged deeding 50 acres of land to "every adult head of household" to avoid land speculation He was not successful.

[47] Mark Sturges, Enclosing the Commons Thomas Jefferson, Agrarian Independence, and Early American land Policy, Virginia Magazine, Vol 119, No 1, The Virginia Historical Society.

[48] Both George Washington and Thomas Jefferson were surveyors as were their fathers

[49] A Cadastral Map shows the boundaries and ownership of properties They have been used by local government both in the U.S. and Europe for identification and tax purposes since the mid 19th Cent

for possession of land has increased, particularly in urban areas. Computer driven surveys, laser and infra-red measurements based on GPS grids,[50] and recorded on those same Cadastral Tax Maps, have made paper titles accurate to within hundredths of feet. Inchoate adverse possession claims stemming from both inaccurate land surveys and trespassing neighbors, will arise ever more frequently when a purchaser discovers that his paper title does not reflect the fact that his predecessors had failed to pay scrupulous attention to trespassers' encroachments on the property he bought.

3. Adverse possession (squatters' rights) now substantively threatens the presumption of regularity in modern land transactions.

"*THE LAST GREAT REAL ESTATE SECRET:* **ADVERSE POSSESSION - IT'S AMAZING! Get Real Estate for Pennies on the Dollar Through Adverse Possession!" - NO TRICKS, NO SCAMS - IT'S THE LAW.** Amazon.com. $39.95.

This "do-it-yourself" paperback provides step-by-step directions for a land speculator to dispossess an unsuspecting property owner without notice or a fair hearing. Still lawful, adverse possession has become the counterintuitive, substantively unjust way to acquire property without recrimination. Once economically pragmatic, it is an unconstitutional anachronism that violates all notions of fundamental fairness, no longer the cheap and easy way to avoid prolonged litigation.

There can be no proper and predictable real property conveyance when property purchased

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[50] The North American Datum, 1983, grid is overseen by the National Geodetic Survey. Each state also has its own grid

today may have been adversely possessed out of the buyer's predecessors years earlier completely without his knowledge, leaving no notice on his title. Surveys and plats come too late to do more than verify the encroachment that has compromised the legitimate purchaser's contracts and covenants for quiet enjoyment that both substantive and procedural constitutional due process and equal protection are supposed to provide.

4. Adverse possession is the "*Cirque du Soleil*" of real property law; its high-wire act of conflicting vague and ambiguous precedents befuddles attorneys, confuses courts, and baffles law students and property owners.

Appellate courts have struggled to reconcile irreconcilable differences between adverse possession opinions when they attempt to applying vague criteria to alleged facts as to how the initial trespass occurred.

Time limits arbitrarily vary from state to state and within the statutes themselves. In Alaska,[51] for example, the Court considered whether a claim of right matured within seven years or a mistaken claim in ten. Subjective definitions of both "claim of right" and "mistake" also vary from case to case. In Minnesota,[52] the Court ruled that a tax paying trespasser took the land in five years, but the ten year Statute applied to a mistake with a claim of right.

In Alabama, the court examined whether possession was statutory or prescriptive.[53] In some

[51] Alaska Stat. 09.45.052

[52] *Ehle v. Prosser*, 197 N.W.2d 458 (1972)

[53] *Kerlin v Tensaw Land & Timber*, 390 So 2d 616(1980)

states, possession is a subjective matter; in others, like Virginia, procedural. When ownership and possession are argued, i.e. claim of right (variously described as adverse or "hostile," exclusive and continuous ownership (but non-exclusively and non-continuously "tacked" to some, but not all, predecessors) open, notorious use for a statutory period, opinions wobble in every direction. Was the trespass permitted or adversely hostile enough; and if so by intent or mistake? How does one prove a "good faith" or "mistaken" belief? A mystifying New Jersey opinion [54] examined both the "Maine doctrine" and conflicting Connecticut law, investing huge amounts of time, ink and paper to adjudicate the ownership of two concrete steps and a walkway as to the hostility needed to award adverse possession.

Courts struggle with what a 'good faith" claim is supposed to mean. In Washington State, the answer is nothing. The Supreme Court overruled 47 cases back to 1895 to hold: "Washington is not the only state which looks to the subjective belief and intent of the adverse claimant in determining hostility. *See, e.g.*, *Ellis v. Jansing*, 620 S.W.2d 569 (Tex. 1981); *Van Valkenburgh v. Lutz*, 304 N.Y. 95, 106 N.E.2d 28 (1952); *see generally* 3 *American Law of Property* § 15.4 (A. Casner ed. 1952). However, the requirement has been regarded as unnecessarily confusing by many legal commentators, *see* Dockray, Adverse possession and *Intention — I*, 1981-82 Conv. & Prop. Law. (n.s.) 256; C. Callahan; Stoebuck, 35 Wash. L. Rev. at 76-80; and A. Casner; and has been abandoned by the apparent majority of states. 3 *American Law of Property* § 15.5, at 785.

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[54] *Mannillo v Gorski*, 54 N.J 378, 255 A.2d 29 (1969)

"For these reasons, we are convinced that the dual requirement that the claimant take possession in "good faith" and not recognize another's superior interest does not serve the purpose of the adverse possession doctrine. *See* Dunbar *v. Heinrich*, 95 Wn.2d 20, 622 P.2d 812 (1980); *Wickert v. Thompson*, 28 Wn. App. 516, 624 P.2d 747 (1981). The "hostility/claim of right" element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination. Under this analysis, permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will still operate to negate the element of hostility. *Chaplin v. Sanders*, 100 Wn. 2d 853, 676 P.2d 431 (1984)."

In 1989, the Oregon legislature, decided to resolve the "good faith" problem by adding a stringent and detailed belief-in-ownership element to the law. Of the few states that require good faith claims, Oregon now enforces the most rigorous of standards. Section 105.620 of the Oregon Code explains the elements necessary to assert a claim of adverse possession, as well as the necessity of satisfying the statute of limitations. Oregon's belief-in-ownership requirement goes beyond mere absence of fraud. The Statute demands that the belief exists at entry and continues through the statutory period. The belief must have an "objective basis" and be "reasonable under the circumstances." In this departure from established adverse

possession law, the motivation of the Oregon legislature seemed clear: the legislature believed the time had come to "restore" a good faith element that had been "interpreted away" by the courts. As a result, no adverse possession claim filed after the statute's effective date, January 1, 1990, has proceeded to the appellate courts.[55]

North Carolina also recognizes only those real-property claims that have been recorded.[56]

In 2006 New York finally enacted legislation changing the statutory standard for adverse possession in New York, generally following the Oregon notion. People got naturally upset when attorneys, like Walling, were bringing *pro se* cases against their neighbors. *Walling v. Przybylo*, 851 N.E.2d 1167,7 N.Y.3d 228, 818 N.Y.S.2d 816 (2006). According to Senator Little's memorandum,

> "This legislation is all about good faith. A person who attempts to possess land that they know all too well does not belong to them should not be encouraged. If a person desires land, they can buy it. However, if they have a reasonable basis to believe that it is their land then that is exactly the good faith dispute over title to real property for which the adverse possession doctrine was established. Adverse possession should be used to settle good faith disputes over who owns land. It should not be a doctrine which can be used offensively to deprive a landowner of their real property. That only encourages mischief between neighbors and even between families. No good can come of it. This is an incentive

[55]Per C. Olson, Adverse possession in Oregon: the belief-in-ownership requirement,

[56] N C Gen. Stat § 47-18(a)

which must be curtailed."

Curtailed, perhaps - cured, never. Legislation is a band-aid on a cancer because the territorial imperative/greed motive can never have a "reasonable basis." Here, "the good faith dispute over title to real property for which the adverse possession doctrine was established," has become simply theft.

Law, like nature, abhors a vacuum. When the state Statutes of Limitation are declared void by this Court, it is inevitable that constitutional alternatives will be enacted in due course to replace adverse possession.

5. Less drastic means must be found to resolve property disputes and stop "squatter's theft," the mischief caused by statutes of limitation for adverse possession.

The notion that property rights disputes are still decided by the ancient "possession trumps all," notion of theft by squatting, adverse possession and its unconstitutional confiscatory Statutes is unbelievable to most people. This case demonstrates an immediate need to find a fair and reasonable alternative. For example, although liability for property taxes that Bass and Mrs. Agnew have paid on the land used by the Sussex since 1978 are minimal, a trespasser's tax liability on hundreds or thousands of acres would be huge. Although the brutal act of depriving Mrs. Agnew of the use and enjoyment of her garden is unquantifiable, it has been real enough for her to vigorously defend it. The increasing value and scarcity of land in developing areas, has made obsolete the presumption that possession, now adverse

possession, is the only way to resolve conflict between property owners.

So this case is not only about brick walls, greedy tricky neighbors or even dodgy lawyers making a quick profit on the side. It really concerns the Statutes of limitations that enable the tricking, dodging and profiteering that have become dark side of property law: theft by statute. This case proves that adverse possession can still lawfully swoop down on the unsuspecting land owner who "thought he got what he bought," and snatch it.

The founding fathers gave The Supreme Court jurisdiction to stop exactly this kind of substantively unconstitutional state action in both the Bill of Rights and later the 14th Amendment. Therefore by declaring all state Statutes of Limitation for adverse possession an unconstitutional taking of real property without substantive due process and equal protection, the Court will have served notice on legitimate property owners that, after seven-hundred years, the circus has finally left town.

C. This case of first impression, holding that intentional fraud is grounds for permitting adverse possession, substantially departs from established Virginia case law. The Virginia Supreme Court's failure to reverse the Circuit Court's interim summary judgment violates its own procedural rule 3.20.[57] The rulings below also violate Mrs. Agnew's right to due process; and set a precarious precedent for resolution of property rights disputes.

1. The facts were disputed.

The Virginia Supreme Court's failure to reverse

[57] VSCR Rule 3.20. "Summary judgment shall not be entered if any material fact is genuinely in dispute."

the Circuit Court's interim summary judgment violated its own procedural rule, VSCR 3.20. The only fact not disputed here is that Bass paid half the cost to build the Brick Wall. Otherwise, all of Mrs. Agnew's proffered evidence conflicted with Sussex' claims that Rawn's serial misrepresentations proved his mistaken belief that he was building the Brick Wall on the common boundary. Her proffered evidence, proved by the facts, *supra*, shows that Rawn planned to obtain Bass' permission to build the Brick Wall, to fence his property with it and to permanently acquire both the Wall and Bass' property by operation of the Statute of Limitations for adverse possession.

Bass'Affidavits dispute Rawn's Letter and Memo. The Notes proffered with Agnew's surveyor's Affidavit dispute Rawn's claim that the "dilapidated," wooden fence was on property line when it was actually located approximately 4.5 feet inside his Sussex property.

The fact that Rawn deliberately told Lester to draw the "Brick Fence (to be constructed)" on the Sussex Plat property line disputes his claim that his cover up was a mistake. The fact that Rawn failed to show Bass the false Plat also disputes Rawn's contention that his mistake was unpremeditated and not carefully planned to avoid the surveyor.

A fair hearing determines whether evidence supporting the legitimacy of the adverse possessor's claim is sufficient. Without taking that evidence, the Circuit Court's grant of summary judgment in favor of the Sussex is a State action in violation of Mrs. Agnew's civil right to due process and equal protection provided by Sec. 1 of the 14th Amendment to the

U.S. Constitution.

2. The ruling violates Virginia precedent.

The lower court Opinion, holding that a recent Alexandria, Va. case, *Quatannens v. Tyrrell,* 268 Va. 360, 601 S.E. 2d 616 (2004), added intentional trick or fraud to the "mistake" criteria for adverse possession, is a substantial departure from previous Virginia case law. The issue of intentional trespass was not raised in the *Quatannens* main case and there are no Virginia cases supporting that notion. In fact, *Quatannens* specifically excludes intentional trespass as a motive for adverse possession. Lemons, J. specifically exempted intentional trespass *sua sponte* in *dictum.* "Eileen Quatannens testified that the Quatannens had not intended to possess any property that they did not own." *Quatannens v. Tyrrell,* 601 S.E.2d 616, 268 Va. 360, at 618. He said, "The collateral question, whether the possessor would have claimed title, claimed the land as his own, had he believed the land involved did not belong to him, but to another, that is, had he not been mistaken as to the true boundary line called for in his chain of title, is not the proximate but an antecedent question, which is irrelevant and serves only to confuse ideas." *(emphasis added) Id.,* S.E.2d at 619. The Sussex argued exactly the opposite and the Court ruled in its favor.

Although the facts in an adverse possession case are usually lost in the sands of time, here they are in the Record. Proffered Affidavits, especially the 1978 contemporaneous Field Notes of surveyor Lester, [58] prove that the Sussex intent to annex Bass' property was planned at the time of the original condominium survey and made clearly

[58] Lester Affidavit and field notes Rawn and Bass Affidavits App C pp. 15-27

evident when Rawn built the Brick Wall on Bass' property. Therefore, when the Circuit Court ruled that the, "any fraud that may have been involved was induced by a unilateral mistake," (citing *Quatannens*), it added trick, deceit and fraud as indices of mistake to Virginia law. By comingling intentional and unintentional trespass, this ruling not only reverses a precedent, it opens the door for unscrupulous theft of property.

3. Mrs. Agnew's defense of permissive use was obfuscated by the Sussex mistake argument and not mentioned in the Circuit Court ruling.

"Permission is properly viewed as a defense to a claim of adverse possession. As such, the defendant to the claim has the burden of proof."[59] Before the *Quatannens* case, Virginia courts had not examined the defense of permissive use at the outset of the trespass thoroughly, although decisions in former cases, *Kim v. Douval* Corp. 259 Va. 752, 529 S.E.2d 92 (2000), *Mary Moody Northen v. Bailey* 244 Va. at 121, 418 S.E.2d 882 (1994), had raised the issue. In *Quatannens*, it was not even pleaded. Apparently frustrated, Justice Lemons finally raised it *sua sponte* to provide logical analysis for clarification. The lower court ignored Mrs. Agnew when she quoted the case, and ruled that her property was taken eight years before she bought it even though both parties had given permission to build the Brick Wall. It failed to mention her proof of permissive use and reliance on the *Quatannens* defense analysis in its Orders.

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[59] *Quattannens*, Id. 601 S.E.623

4. The Ruling Presents a Precarious Precedent for Resolution of Property Rights Disputes.

The Sussex justified Rawn's trespass by "mistake" by claiming that misplaced property lines are common throughout Richmond's historic Fan District and that to rule otherwise would cause much litigation when they are discovered. That fact is not disputed. However, the lower court opinion has now opened the door to mischief, facilitating that notion by holding that a trespasser or his predecessor who intentionally trespassed for the statutory period, need only go to court and the Statute of Limitations for adverse possession will routinely convey possession of the trespassed property to him.

This case proves conclusively that the Statute has already put at risk proper conveyance and traditional notions of land ownership and exacerbated that risk by adding intentional trick or fraud to the rationale for adverse possession. Predictably, there will be as many property line disputes as there are misplaced property lines, probably thousands already vulnerable since case law provides the original trespass to be "tacked" to the property of predecessors.

By adding fraudulent trickery to the miasma of already baffling qualifications for adverse possession, the Virginia Courts have created a monster of neighborhood dissention and hostility -- not a cheap and quick way to settle boundary disputes, the usual rationale for adverse possession. The disputed facts in this case do not limit it to the shoot-out on Park Avenue between the Sussex and

Gloucester that has been ongoing for six years. Too many properties in Virginia have the potential to distort or mirror its facts, as Sussex mirrors *Quatannens*.

CONCLUSION

Your Petitioner respectfully requests that the U.S. Supreme Court declare that § 8.01-236, of the Virginia Code, its Statute of Limitation for adverse possession, is unconstitutional because it violates both substantive and procedural due process and equal protection for property within the mandate of the 14th Amendment to the Constitution of the United States.

Supreme Court, U.S.
FILED

10127 4 APR 14 2011

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

MARIAN K. AGNEW,

Petitioner,

v.

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION,

Respondent,

On Petition for a Writ of Certiorari To the Supreme Court of the State of Virginia

APPENDIX

Marian K. Agnew
The Gloucester Apartments
1820 Park Avenue, Apt. 2
Richmond, Virginia 23220
(804) 359-8248

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Record No. 100843
Circuit Court No. CL08-5626
(entered November 15, 2010)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 15th day of November, 2010.

Marian K. Agnew,
Defendant-Appellant,
v.
Sussex Condominium Unit Owners Association,
Plaintiff-Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day on September, 2010 and grant a rehearing thereof, the prayer of the said petition is denied.

Patricia L. Harrington, Clerk
By: /S/ Deputy Clerk

Record No. 100843
Circuit Court No. CL08-5626
(entered September 9, 2010)

VIRGINIA:

In the Supreme Court of Virginia: held at the Supreme Court Building in the City of Richmond on Thursday the 9th day of September 2010.

Marian K. Agnew,
Defendant-Appellant,
v.
Sussex Condominium Unit Owners Association,
Plaintiff-Appellee

From the Circuit Court of the
City of Richmond

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Patricia L. Harrington, Clerk
By: /S/Ebby Edwards, Deputy Clerk

Circuit Court No. CL08-5626
(argued October 2, 2009, before Judge Melvin R. Hughes Jr.)
(entered October 21, 2009)

Circuit Court of the City of Richmond

Re: CL0008-5626

The Sussex Condominium Unit Owners Association
v.
Marian K. Agnew, [and the Marian K. Agnew Revocable Trust][1]

Dear Counsel for the Sussex and Ms. Agnew,

You will recall this case which is before the Court on plaintiff's motion for summary judgment. The motion was argued on October 2, 2009 after which the court took the matter under advisement. After the hearing, Agnew has submitted two briefs (1) Post-Hearing Brief and Objection, filed October 6, 2009, and (2) Defendant's Second Post-Hearing Brief, filed October 19. Plaintiff has responded. Plaintiff's motion is based on the pleadings. It has also attached to its Memorandum in support defendant's answers to request for admission, interrogatories and production of documents.

The Court took the matter under advisement to read Quatannens v. Tyrrell, 268 Va. 360, 601 S.E. 2d 616 (2004) and Helms v. Manspile, 273 Va. 1, 671 S.E. 2d 127 (2009), two cases relied upon by plaintiff. Upon reading the cases, the Court will have to agree

[1] Dismissed retroactively:11-30-09 Order, R: 364-366.

with Plaintiff, they very nearly match what we have here. Qutannnens give a rather extensive discussion of adverse possession; the principle plaintiff relies on in its assertion that it owns the subject disputed real estate lying between the parties adjoining properties. The disputed property consists of a brick wall lying on the recorded parcel of defendant's land lying west of the recorded boundary line which plaintiff asserts it has acquired by adverse possession.

Quatannens observes, as is the case here, that questions of adverse possession "are fact specific and their resolution...turn on...one or two of the elements of adverse possession." Id. 268 Va. at 365. Here, the questioned elements are whether plaintiff's possession has been "adverse" or "hostile" and on a "claim of right." According to Helms, as to the element of claim of right, if present, the possession is adverse or hostile. Quoting Groppo v. Blanks, 241, Va. 58, 400 S.E. 2d 168 (1991) occupancy use equates to a claim of right. Id. 277 Va. At 8.

Here, an issue of mistake revolves around the construction of the brick wall on what the parties' predecessors in title believed was the property line dividing the adjoining properties. Indeed, the parties agree that defendant's predecessor now believes that in 1978, when the wall was to be constructed, plaintiff's predecessor tricked or deceived him into thinking that the wall was placed in a proper position on the boundary line. This raises the question whether adverse possession obtains when the parties act on the mistaken belief of where the boundary line is and the predecessor and his successors exert all the actions incident to ownership with respect to that which lies on the side of the wall claimed as acquired by adverse possession. Regarding mistaken belief in

these circumstances, the Court said:

> "When a claimant mistakenly believes that a particular 'line on the ground' represents the extent of his or her own land and treats all the land within the line on the ground as his or her own in a manner that satisfies the requirements of adverse possession - particularly actual, exclusive and visible possession then the hostility requirement is generally satisfied."

So, with all the elements of adverse possession in place and satisfied, plaintiff has established its right, title and interest in the disputed property consisting of the brick wall, etc. described in the papers.

Finally, there are two issues defendant has raised which need to be addressed. These have to do with the plaintiff's standing, which defendant initially raised but conceded later, and the question of tacking. After the concession on standing, defendant raised the question of continuity of plaintiff's possession or rather, the ability of the present plaintiff, an unincorporated association, to derive the benefit of adverse possession with it is not the same owner as the now defunct Sussex Corporation.

There is no issue over when the wall was built, 1978. The present plaintiff, through a corporation, Sussex, Inc., came into title, it contends in 1993 or 1994, the requisite fifteen years having elapsed. Plaintiff in the case is an association of condominium owners. Sussex, Inc., plaintiff's immediate predecessor in interest, was incorporated in 1979. In 2005, its corporate charter lapsed but by that time the 15 year requirement had been met. Virginia law

allows for tacking to establish adverse possession provided the successor adverse users are in privy with their predecessor's adverse users. In such cases, such a successor user can aggregate the periods of adverse ownership and assert title through adverse possession. I think the point defendant makes is that with the lapse in Sussex's corporate status in 2005, the plaintiff here cannot claim through adverse possession because it is not the same entity as Sussex, Inc. Both Quatannens and Helms recognize tacking under their respective facts. Each condominium owner owns their respective units and by virtue of Va. Code §§ 55.79.80, the association can maintain an action, as here, with respect to the common elements" of the condominium. In other words, the plaintiff here, the condominium association, is latest in a line of successive parties with privity through whom adverse possession can be justly claimed.

Lastly, defendant argues that since the 1978 transaction involving the placement of the brick wall involved a trick, as mentioned above, no adverse possession can lie. Quatannens answers this in that any fraud that may have been involved was induced by a unilateral mistake. It is covered by the Court's ruling on the effect of a mistake as to adverse possession discussed above.

Sussex counsel can provide an order sustaining the motion for summary judgment.

Very truly yours,
/S/
Melvin R. Hughes, Jr.

Circuit Court No. CL0800-5626-0
(argued October 2, 2009 before Judge Melvin R. Hughes.
(entered Nov. 12, 2009)

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION

Plaintiff,

v.

Marian K. Agnew and
[The Marian K. Agnew Revocable Trust][1]
Defendants.

ORDER

This matter came before the Court for a hearing on October 2, 2009, on the Motion for Partial Summary Judgment, regarding ownership of the property at issue, filed by the Plaintiff Sussex Condominium Unit Owners Association (the "Sussex"), and the Motion to Dismiss filed by Defendant Marian K. Agnew ("Agnew"), who is a retired member of the Virginia State Bar representing herself in this matter *pro se*.

Having considered pleadings, the briefing submitted by both sides before and after the hearing and the argument of counsel for the Sussex and of Agnew, IT IS HEREBY ORDERED that the Sussex's Motion for Partial Summary Judgment is GRANTED and that Agnew's Motion to dismiss is DENIED for the reasons stated in the Court's Letter Opinion of October 21, 2009.

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[1] Dismissed: Order 11-30-09, R: 364-366

The Court FINDS, based on the pleadings and admissions, that ownership of the property at issue (the Wall and a small strip of land east of the Wall) passed to the unit owners of the Sussex by virtue of the doctrine of adverse possession in 1994, upon the running of the statutory period after the erection of the Wall in 1978 and the establishment of the Sussex condominiums in 1979. The Court further FINDS that the Sussex has demonstrated by clear and convincing evidence each of the elements of adverse possession, including that it possession of the property at issue has been adverse or hostile and under a claim of right (as evidenced by the Sussex's use and occupancy of the property) and for the statutory period. The Court further HOLDS that the Sussex is the appropriate party to have brought the claim of adverse possession.

The Court's Letter Opinion and this Order having disposed of Counts I and II of the complaint in the Sussex's favor, remaining in this case are Counts III and IV of the Sussex' Complaint, to the extent not resolved by the Court's Letter Opinion and this Order, and the appropriate relief to be awarded. The Court DIRECTS Agnew and counsel for the Sussex to confer on these matters and submit to the Court an appropriate Order or be prepared to discuss those matters and submit to the Court an appropriate Order or be prepared to discuss those matters at the pretrial conference scheduled for November 23, 2009 at 10:00 a.m.

Prior to the October 2, 2009 hearing, Agnew had also filed with the Court a Motion to dismiss the Sussex and to Add Sussex Unit Owners as Plaintiffs. As indicated in the Court's Letter Opinion, Agnew

conceded at the hearing that the Sussex has standing. Agnew's standing Motion is therefore DEEMED WITHDRAWN.

The Clerk shall send an attested copy of this Order to all counsel of record and any parties not represented by counsel.

("Defendant's exceptions noted. Endorsement
waived pursuant to Rule 1:13, /S/ MRH"
/S/ Melvin R Hughes, Judge

A copy teste: Bevill M. Dean, Clerk
by /S/ Donna Clythger, D.C.

Circuit Court No. CL0800-5626-0
(argued January 26, 2010.)
(entered February 3, 2010)

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION
Plaintiff,
v.
Marian K. Agnew, et al,
Defendants.

Before: MELVIN R. HUGHES, Circuit Court Judge

FINAL ORDER

On January 26, 2010, this matter came before the Court for trial on the remaining claims of trespass and conversion (Counts III and IV of the Sussex's Complaint) to the extent not resolved by the Court's prior rulings. The Court having considered the evidence and argument at the trial and having determined that no further briefing is required, in accordance with the Court's ruling from the bench at trial, IT IS HEREBY ORDERED as follows.

The Court FINDS that Mrs. Agnew trespassed on and converted the Sussex's property by tearing down part of the wall. The Court further FINDS that four

thousand nine hundred sixty dollars ($4,960.00), which is the total of the cost for repair of the wall ($4,392.00) and costs already incurred ($568.00 for recovery of bricks and erection of a temporary fence, is the appropriate measure of damages on the Sussex's claims.

Accordingly, the Court hereby ENTERS final judgment in favor of the Sussex [*against Marian K, Agnew, Defendant, (MAH)]* in the amount of five thousand ninety four dollars ($5,094.00), the above damages plus Plaintiff's costs of $134.00 (the $84.00 filing fee for this case plus $50.00 for service of the Complaint upon the two defendants) pursuant to Va. Code Sec. 17.1-601. Post-judgment interest on the principal amount of $4,960.00 as provided for in Va. Code Secs.8.01-382 and Sec.6.1-330.54, shall run from the date of entry of this Order.

THIS IS A FINAL ORDER

All objections and exceptions made at trial and in prior fillings are noted, and endorsements are waived in the Court's discretion pursuant to Rule 1:13.

The clerk shall send copies of this Order to Ms. Agnew and counsel for Plaintiff.

ENTER: 2/3/10
Melvin R. Hughes, Jr,
Judge

A Copy teste: Bevill M. Dean, clerk by CA Hargrove, D.C.

Circuit Court No. CL08-5626
(Letter Opinion Melvin R. Hughes, Jr., Judge)
(entered February 25, 2010)

Circuit Court of the City of Richmond

Sussex Counsel
[address]
Marian K. Agnew
1820 Park Avenue #2
Richmond, Virginia 23220

The Sussex Condominium Unit Owners Association
v.
Marian K. Agnew, and the Marian K. Agnew Revocable Trust

Dear Sussex Counsel and Mrs. Agnew,

This will acknowledge receipt on February 23, Ms. Agnew's Defendant's Motion to Rehear and Reconsider in connection with the above.

The motion recites and the court's record confirms that the final order was entered February 3, 2010, making the motion filed one day shy of the twenty-one days provided under Rule 1:1 after which the court can no longer exert jurisdiction. While timely filed before the twenty-one day time, Rule 4:15 provides that oral arguments on motions for reconsideration require approval by the court. Having reviewed the motion, the court considers that the rulings made should stand and there is no reason for oral argument on reconsideration.

Accordingly, I have this day entered an order denying the motion.

Exceptions are noted.

Very truly yours,
/S/
Melvin R. Hughes, Jr

Record- Plaintiff's Exhibits
November 8, 2002
Marian K. Agnew, Esq.
1818 Park Avenue, Apt.2
Richmond, VA 23220

Dear Marian,

In response to your June, 2002 letter, attached you will find a signed and notarized response of explanation relative to the creation and placement of the brick "wall' in question.

'The wall' was constructed during the summer of 1978 with the full knowledge and cooperation, including monetary, of Walter and Barbara Bass, the owners of the property you recently purchased, and the then owners of the Sussex.

Real estate guidance tell us that the "law of adverse possession" takes precedent after 15 years and after 20 years there is an 'easement of prescription.' Therefore, your offer of "temporary permission" to use 'the wall' seems to have come too late. And certainly your mention of just tearing it down would seem unfounded and ill-advised. Please understand that if you deliberately damage "the wall,"you will be responsible for costs associated with any repairs.

We would like to propose an agreement that if "the wall" should ever come down due to an unforeseeable and accidental situation, then the use of your property in accordance with the 'true boundary line' would resume. And we would like to condition that we will

make reasonable repairs to "the wall" to keep it in good condition, should that need arise.

We too are hopeful that this issue can be amicably resolved and we can continue to live as good neighbors in the historic Fan district.

Sincerely,

/S/

Lee Parker, President, Sussex Association

1814 Park Avenue, Unit 3

Richmond, Virginia 23220 Att. Certified Mail Return Receipt

SUSSEX 0039

Jeffery J. Rawn
1130 S. Michigan Ave.
Apt 3703
Chicago, IL 60605
312. 957.1003
rawns@earthlink.net

Mr. Lee Parker, President
The Sussex Association
1814-16 Park Avenue
Richmond VA 23220
Re: Brick wall on West property line at
1814-16 Park Ave.

Dear Lee,

In an effort to resolve an apparent property line dispute which has been brewing recently between Marian Agnew, the owner of 181-20 Park Ave., and The Sussex Association, the owner of 1814-16 Park Ave., each in Richmond, Virginia, I would like to take a moment to set forth the events leading to the construction of the Brick Wall (The Wall) which currently divides the properties.

In 1975, I purchased 1814-16 Park Ave., (the Sussex) with a partner. We took title in the name of Park Sussex Associates, (PSA). In the summer of 1978, PSA decided to convert the apartment building to a condominium. For tax purposes, we created Park Sussex Development Corp. (PSDC), and conveyed title to the property. I was president and 50% owner of SDC. It was my role to manage the whole conversion process as well as all renovations to

the building and property. In that capacity, I determined that it was essential to replace a decaying and unattractive fence which defined the back (north) and west side boundaries. I approached the then owners of the adjoining west property, 1818-20 Park Ave, Walter and Barbara Bass, to enlist their cooperation, guidance and, perhaps, support regarding that portion of The Wall which would continue to be our mutual boundary.

I discussed with the Basses the nature and design of The Wall as well as the costs for that portion which was common to our respective properties. The Basses were comfortable with the plans and agreed that the old wooden fence needed replacing. They further agreed to share in the expenses for the mutual portion (50/50). We also, jointly and mutually, decided to place the wall exactly where the former wooden fence was. Neither of us felt that a survey was necessary since the wooden fence appeared to be the property line.

The Wall was erected during the summer of 1978, in its current location. It was paid for jointly by the then owners of the two adjoining properties. Its location was jointly agreed upon by the then owners of the two properties. It has stood there, without protest, for the past 24 years.

Regards,
/S/
Jeffery J. Rawn

The signature on the attached letter, addressed to The Sussex Association, regarding the origin of the brick wall, which forms a boundary between 1814-16

Park Ave, "The Sussex Condominium" and 1818-20 Park Ave. is the signature of Jeffrey J.Rawn of Chicago, IL.

I hereby attest to the foregoing as of 29 October, 2002.
Christine R. Swink
Notary Public /SEAL/

Record, p. 86.

Walter Bass Memo sent to Parker, December 6, 2002

6 December 02

To Whom it may concern:

I owned 1818-1820 Park Avenue, Richmond, Virginia, during the 70s through the 90s. In the late 70s Jeff Rawn, a next door neighbor, informed me that he had planned to build a brick wall between our properties. The wall was to be built between the Sussex and the Gloucester apartment buildings. Jeff Rawn asked if I would be willing to pay half of the cost. I did, which seemed the neighborly thing to do.

/S/
Walter H. Bass III

Jeffery Rawn Email sent to Parker, February 19, 2003

"To set the record straight, Walter Bass and I never entered into any easement agreement verbal or otherwise. We simply agreed to build the wall where we built it, without having the line surveyed. The Sussex Association is entitled to an easement by virtue of the length of time which has elapsed without objection by the previous owners."

SUSSEX 0296 Record p.82.

STATEMENT FROM JOHN G. LESTER, L.S

I am the licensed surveyor who prepared the survey plat dated October 19, 1978, entitled "The Sussex 'A Condominium' City of Richmond, VA", for Jeffery Rawn when his company converted the real estate located at 1814-1816 Park Avenue to the Sussex Condominiums. When preparing the plat, I relied on the field notes of Mr. Albis, a surveyor for my company, Lewis & Owens, Inc., copies of which are attached to this statement as Exhibits No. 1-1 to 1-3. I also relied on Jeffrey Rawn's response to my questions, attached Exhibit No. 6, my common practice when ancillary issues not included in the field notes are involved.

Mr. Albis' notes show that we did a whole property survey locating the points from Meadow Street to Allen Avenue, from Park Avenue to the alley behind the property. We also located the footprint of the building and described other points of interest on the Sussex property as well as the abutting property on the west, owned by Walter Bass at 1818-1820 Park Avenue. Those points of interest included an old fence located on the Bass property. My drawing (plat), taken from those notes, is attached to this statement as Exhibit No. 2 and it was attached to the Declaration for the Sussex Condominiums as Exhibit C-1 .

Mr. Albis' notes showed an old fence, located entirely on the Bass parcel, in the rear yard of the Bass property, the same fence drawn on my plat, Exhibit No. 2. It was located inside the Bass parcel, 0.96' west from the Sussex boundary line on the Park Avenue end, and, 1.90' inside the Bass' property near the alley. The old fence is also shown on Exhibit No.

3, the 1952 plat made by Chas. H. Fleet & Assoc., and usually called "the City Plat." This plat is referred to in the call on the deed transferring the Sussex property to Jeffrey Rawn and his partner. DB ref :d702 page 1818, Exhibit No 9.

After I reviewed Mr. Albis' notes, I called Mr. Rawn, asking for additional instruction as to how he wanted several details depicted on the final plat. My notes are attached as Exhibit No. 6. Question 4 concerned "Fence or any other improvements/ additions." Mr. Rawn instructed me to draw a brick fence to enclose the rear yard, evidently a work in progress, locating it on the property line between his property and the Bass property and extending along the rear property line of Mr. Rawn's parcel, with the alley. But for the fact that Mr. Rawn told me that he and Mr. Bass had agreed on this location, I would not have included that detail on my drawing. Therefore, my survey plat, Exhibit No 2, also shows "Brick Fence Not Yet Completed," located on the common boundary between the Sussex parcel and the Bass parcel.

I have also reviewed notarized statements made by Jeff Rawn, Exhibit No. 7, and Walter Bass, Exhibit No. 8, concerning these same events. They agree on three important points: first, there was an old fence; second, it would be replaced with a brick fence located on the mutual boundary line; and third, they would share the cost (50/50), a common practice with such projects on abutting property. However, Mr. Rawn's claim that the old fence was either

wooden or located on the property line is clearly not accurate. [1] The survey showed that the fence was not on the property line. Mr. Rawn then filed my plat and included it in the Declaration for the Sussex Condominiums, as Exhibit C-1. Walter Bass states that Rawn did not show him this 1978 plat and that he was completely surprised that the brick wall was built completely on his property.

I have also reviewed two later plats: first, a 2001 plat of the Bass parcel, which I understand is now owned by Mrs. Agnew, Bass' successor, attached to this statement as Exhibit No. 4, and second, a 2008 Sussex plat, attached as Exhibit No. 5. Both plats show the property line between the Sussex and Bass (now Agnew) parcels in essentially the same location as my earlier 1978 plat. Notably, both recent plats show a brick wall located on the Bass/Agnew parcel in the same location as the old fence, to which I referred above, and which is shown on my plat, Exhibit No. 2 .

Therefore, in my opinion, there is no boundary issue here because all the boundary lines shown on all the survey plats are essentially congruent. However, the two recent surveys, Exhibits 4 and 5, show that the Brick Wall was clearly built on the old fence line, entirely on the Bass parcel, not on the common boundary line where I was advised by Mr. Rawn to draw it on my plat.

---

[1] The Albis' notes depict two fences. The "old fence," located on the Bass' property and the current site of the brick fence, was a wire fence, depicted by an "x" between lines. A wooden fence, depicted by an " " " between the lines, was located about 4.5 Ft. inside the Sussex property, running from the rear corner of the building toward the alley.

___/S/_____
John G. Lester, L.S.

Commonwealth of Virginia
County of Henrico, to wit,

The foregoing "Statement of John G. Lester, L.S.", was sworn and subscribed to before me on this 11 of May, 2009, by John G. Lester.

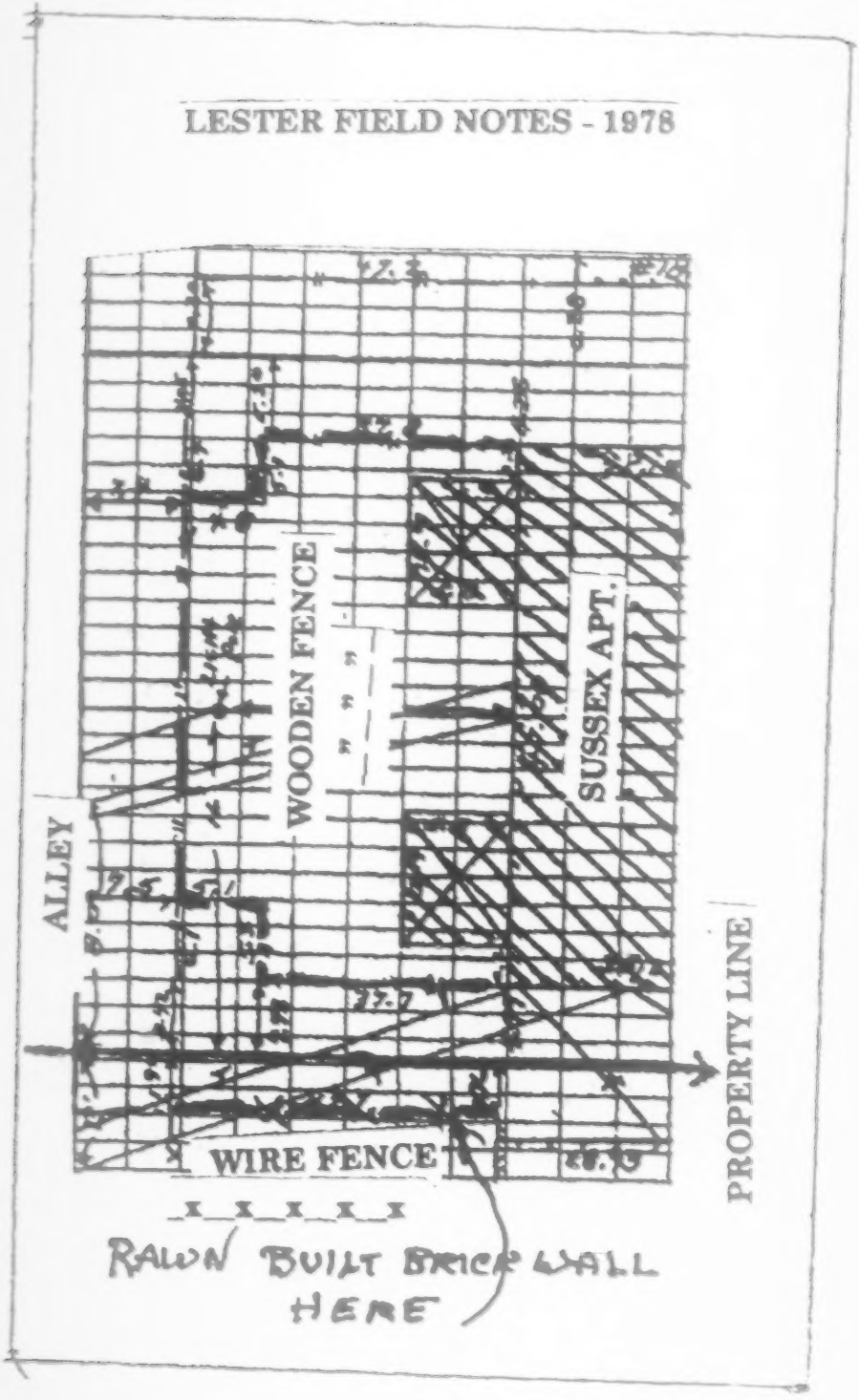
Rebecca E. Woods
Notary Public
My commisstion expires: August 31, 2011
Registration No.145468

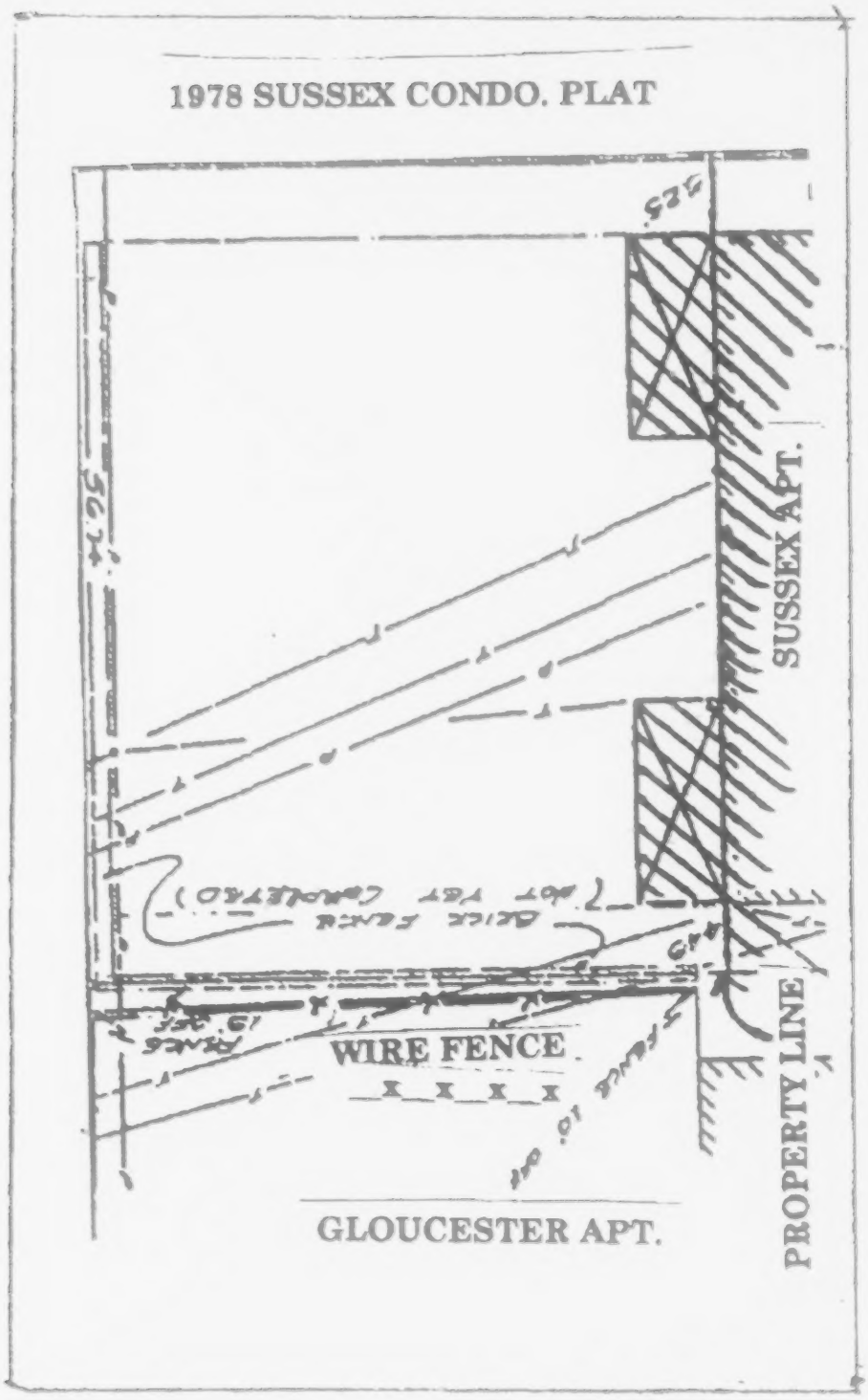
ATTACHED NOTES: 1814 Park Ave.

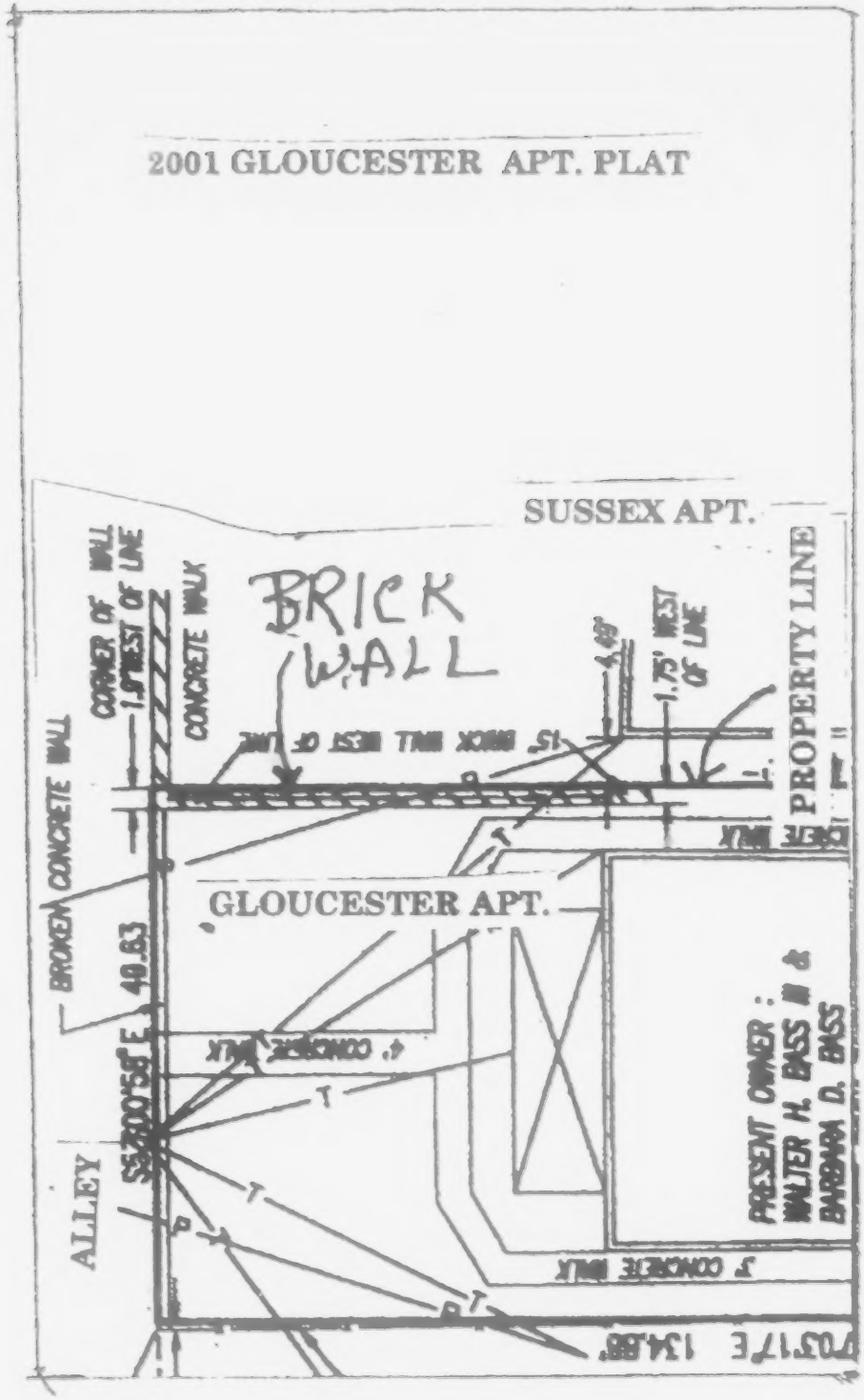
Questions:
1. Name - The Sussex "A Condo"
2. Storage Areas
3. Common & Limited Common Elements
4. Fence or any other improvements/additions
5. Brick patios type in front, what will happen to those or C.E.

Plat
1. Sections thru floor
2. **Fence under construction "Not Yet Completed."**

LESTER FIELD NOTES - 1978




1978 SUSSEX CONDO. PLAT
SUSSEX APT.
WIRE FENCE
GLOUCESTER APT.
PROPERTY LINE


2001 GLOUCESTER APT. PLAT
SUSSEX APT.
BRICK WALL
CORNER OF WALL 1.5' WEST OF LINE
CONCRETE WALK
1.75' WEST OF LINE
PROPERTY LINE
BROKEN CONCRETE WALL
GLOUCESTER APT.
40.83
ALLEY
PRESENT OWNER :
WALTER H. BASS
BARBARA D. BASS

Opinion from William Jeffries, Esq., Kane Jeffries, (wlj@kanejeffries.com)

To: Marian Agnew,
Date: October 14, 2008:

Marian,

"At the time the brick wall was built, Jeff Rawn knew that the wooden fence was on the Bass parcel - his 1978 Survey shows it. If Rawn had shown the 1978 plat to Bass at the time the brick wall was built, Bass would have known that the wooden fence was on the Bass parcel and probably would not have agreed that the wooden fence was on the property line, as is inferred from Rawn's letter. It is likely that either Bass was mistaken or was tricked. Rawn's successor in title should not profit from the mistake (mistake by Bass) or trick."

Record p. 87.

Revised Statement from Walter Bass

After reading the Statement from John Lester, the surveyor who drew the 1978 Sussex Condominium plat, reading his notes and reexamining that plat in detail, I am revising my statement, made in November 2008, as follows:

In 1974, my partner and I owned an apartment building, the Sussex, at 1814-1816 Park Avenue, Richmond, Virginia. I also owned the adjacent building, the Gloucester, at 1818-1820 Park Avenue, Richmond, Virginia. In 1975, we sold the Sussex to Jeff Rawn and his partner. At that time, Mr. Rawn's family lived in the Sussex and my wife and I lived in the Gloucester.

Jeff Rawn became President of the Park Sussex Development Corporation in 1978 and managed the conversion of the Sussex to condominiums. At that time, Jeff approached me to enlist my cooperation in order to build a brick wall in the back yard on the boundary between my property (the Gloucester) and his (the Sussex). I asked if he knew where the property line was located. He told me that he did and marked the spot and insisted that was where it should be built. We discussed the design and cost of the brick wall. I agreed to pay a portion of it. Jeff had the brick wall constructed.

I did not know until I recently received a copy of the survey plats of both the Sussex and Gloucester property, now owned by Mrs. Agnew that the brick wall was not built on the mutual boundary between the Sussex and the Gloucester. Instead, it was built entirely on the land of the Gloucester, which had been my property at that time. This came as a complete surprise to me. I presumed that when Jeff Rawn and I had our conversation that the brick wall was to be built on our mutual boundary, as he has stated in his notarized letter to Mr. Parker, and that he knew where that boundary was located.

I saw a copy of the 1978 Sussex condo plat that was recorded with the declaration which converted the Sussex to condominiums, for the first time several months ago. When Jeff approached me about the location and design of the brick wall, he did not show this to me. It clearly shows the property line and the proposed location of the brick wall on the mutual boundary. It also shows a fence on my property near the eastern boundary. If Jeff had shown me the plat, I would have been comfortable with the plans because it shows "a Brick Fence (not yet completed)" drawn on the mutual property line, as Jeff had stated when he asked me to pay for half the cost. I do not remember the wire fence that the surveyor drew on the east side of my property in that same general location. (There was another wire fence on the west side that I replaced with a board fence.) Both wire fences were very dilapidated and this one was probably overgrown with creeper vines. I do remember an old wooden

fence that ran from the rear corner of Jeff's building back toward the alley, probably five feet on the Sussex property. That fence is also shown on the 1978 plat.

I now understand that the 2001 plat done for Mrs. Agnew, shows that Jeff had the brick wall built in the same location as the eastern wire fence shown on the 1978 plat., not straddling the property line I now believe that I had been deceived.

At that time, I assumed that Jeff knew the importance of respecting boundary lines since he was a very experienced developer and banker. To me, it is obvious that the wall belongs to Mrs. Agnew since it is completely located on her property.

/S/
Walter Bass

Commonwealth of Virginia
City/County of Halifax, to wit:

Sworn and subscribed to before me by Walter Bass, this 21st day of May, 2009.

Betsy S. Warren /S/
Notary Public
My Commission expires: 06-30-2011
Registration No. 751724

Case No. CLO8005626-00

Record pp. 433-441.

(entered January 19, 2010)

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

The Sussex Condominium Unit Owners Association

Plaintiff,

v.

Marian K. Agnew,

Defendant.

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE

Defendant, Marian K. Agnew, hereby opposes and objects to further Sussex efforts to violate her right to due process by preventing introduction of truthful evidence conclusively showing that Agnew cannot and has not trespassed on her own property. Agnew asserts that she neither trespassed nor damaged Sussex property when she demolished part of an offensive brick structure deliberately built in 1978 on her predecessor's property and continuing in violation of the criminal provisions of the Virginia Condominium Act, § 55-79.103. [1]

[1] This case, unsupported by fact or law, was brought for the Plaintiff Sussex Association by the attorney who is also *pro se* without disclosing his *pro se* interest on submitted documents. He owns an equal undivided interest in the common area enclosed by the brick fence, and occupies one-of-two ground-floor condominiums with direct access to the enclosed garden. The other is owned by the Sussex Declarant who has admitted violating the criminal provisions of the Virginia Condominium Act, § 55-79.103 when he filed a fraudulent condominium plat that showed the brick fence "not yet completed" on the property line, not the place where it was finally built.

SUMMARY

The Sussex has moved to exclude nearly all of Agnew's properly proffered truthful and well-substantiated evidence disproving its case for trespass and conversion. An overwrought and distorted interpretation of Agnew's former statements attempts to limit her evidence to the misperception that this court's recent interlocutory decision (now on appeal) had already divested the disputed area of her Gloucester property to the Sussex at the time she removed part of the offensive structure. The Sussex has not listed any exhibit amending Agnew's deed that has been of record since 2001. Unless and until the Sussex can prove that the disputed property has been conveyed to the Sussex as of the time of her alleged trespass, Sussex' trespass and conversion issues are not ripe. Finally, the Sussex has not pleaded the requisite elements of trespass in its verified complaint.

Agnew objects to the inclusion of the November 10, 2008, Statement from Walter Bass attached to Agnew's Answer, Sussex Exhibit 1. Bass' Statement was revised and replaced after he reviewed documents obtained in discovery, notably the John Lester Statement and Sussex condominium plat. It is therefore, attached and submitted with Agnew's exhibits as Revised Statement of Walter Bass, dated May 21, 2009.

Agnew's trial exhibits prove that Sussex officers, Parker and Rawn, have consistently acknowledged her title to and possession of all property west of the Gloucester/Sussex boundary. Until opposing counsel

moved into the Sussex, they negotiated with Agnew in good faith to resolve the property line dispute. Agnew will show that no one representing the Sussex accused her of trespass or conversion until this case was filed in December, 2008. Agnew witness, surveyor John Lester, will present evidence relating to the amount of land involved and the location of the Gloucester/Sussex property line that has not moved since the offensive brick fence was surprisingly built on Gloucester property after the Sussex condominium plat was filed. Last week, opposing counsel deposed Agnew witness, Jim Anderson, by phone without Agnew's knowledge. Therefore, Anderson's testimony must be permitted.

ARGUMENT

1) The Sussex Verified Complaint, fails to plead the essential elements of trespass: possession and occupation of the land.

"[A] trespass is an unauthorized entry onto property which results in interference with the property owner's possessory interest therein." 5 Richard R. Powell, The Law of Real Property p. 707 (Patrick J. Rohan ed., 1994). Thus, in order to maintain a cause of action for trespass to land, the plaintiff must have had possession of the land, either actual or constructive, at the time the trespass was committed. Kessler v. Fentress 248 Va 423, Blackford v. Rogers, 2 Va.Dec. 292, 294, 23 S.E. 896, 897 (1896) (emphasis added.)

"A litigant's pleadings are as essential as his proof, and a court may not award particular relief unless it is substantially in accord with the case asserted in those pleadings. Brooks v. Bankson, 248 Va. 197, 206,

445 S.E.2d 473, 478; Gwinn v. Collier, 247 Va. 479, 484, 443 S.E.2d 161, 164; Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp., 221 Va. 1139, 1141, 277 S.E.2d 228, 229. Thus, a court is not permitted to enter a decree or judgment order based on facts not alleged or on a right not pleaded and claimed. Hensley v. Dreyer, 247 Va. 25, 30, 439 S.E.2d, 372, 375; Harrell v. Woodson, 233 Va. 117, 121, 353 S.E.2d 770, 773; Ted Lansing Supply Co., 221 Va. at 1141, 277 S.E.2d at 229; see Ainslie v. Inman, 265 Va. 347, 356, 577 S.E.2d 246, 251; Smith v. Sink, 247 Va. 423, 425, 442 S.E.2d 646, 647." Jenkins v. Bay House, 266 Va. 39 (2003)."

The rationale supporting this basic rule is plain. As we have stated, "[e]very litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense. . . . The issues in a case are made by the pleadings, and not by the testimony of witnesses or other evidence." Ted Lansing Supply Co., 221 Va. at 1141, 277 S.E.2d at 230 (quoting Potts v. Mathieson Alkali Works, 165 Va. 196, 207, 181 S.E. 521, 525)." Id., at 41.

Count III: Trespass, of the Sussex' Verified Complaint, Exhibit 2, does not assert that Agnew committed a trespass on land possessed by the Sussex; only that Agnew entered and interfered without authorization with the Sussex' interest and right in the Wall. Facts 14 and 15 of the Sussex Verified Complaint claim ineffectively that the Sussex "used and maintained the property on the east side of the wall"; and that the Sussex "claimed and continues to claim ownership of both the portion of the Agnew property upon which the wall is built and the additional portion of the Agnew property east of the wall, together, ("The disputed Property")." Only Sussex Count I: adverse possession, claims

"continuous possession," an inchoate executory interest still unrealized.

In so stating, the Sussex not only admits that Agnew occupied and possessed the disputed property at the time of the alleged trespass, but also fails to claim that it had possession of either the offensive brick wall or occupancy of Agnew's abutting property at that time. These are the essential elements of trespass that Agnew intends to prove by her exhibits and testimony. Put simply, the Sussex has put the cart before the horse, attempting to bootstrap a claim for damages on the expectation of a future possessory interest in Agnew's property. The Sussex cannot now amend its pleadings to include them or attempt to confuse the Court by misrepresenting Agnew's admissions or its own recent letter Opinion.

Based on these allegations, the trespass and conversion issues pleaded by the Sussex are without foundation. The total absence from these pleadings of any claim that the Sussex occupied or possessed the Wall or disputed property at the time Agnew allegedly trespassed precludes the Court from concluding that Agnew trespassed; and from imposing a remedy based on such facts not alleged. See Sink, 247 Va. at 425, 442 S.E.2d at 647; Hensley, 247 Va. at 30, 439 S.E.2d at 375; Harrell, 233 Va. at 121, 353 S.E.2d at 773.

Until this case was brought in December 2008, the pleadings show that Agnew was never provided notice that the Sussex claimed actual possession of her property[2] The absence of notice was especially detrimental to Agnew. Her garden renovation plans have been delayed for seven years because the design

[2] Sussex President Lee Parker's November 8, 2002 and February 26, 2003 letters do not mention trespass.

depends on the area of land west of the property line as well as the eventual fate of the offending brick fence. The plaintiffs bore the burden of proof on that issue. See Boerner v. McCallister, 197 Va. 169, 175, 89 S.E.2d 23, 27. Thus, Agnew was placed in the untenable position of bearing the burden of proof on an issue that Sussex did not identify in its pleadings.

2) Agnew's exhibits will show that she had rightful possession and authority to notify the Sussex that the offensive brick fence was located on her property and that she intended to demolish part of it.

Agnew's adverse witness, Sussex President, Parker, will testify that the Sussex has had actual notice since 2002 that the wall was on Agnew's property. He will state that, when Agnew discovered the offending brick wall on her property, she gave him a copy of her 2001 plat and notified him that the that the wall and abutting property was located on her property, in her possession; and that the wall would be removed at a later date when she renovated her garden. (The Sussex 2008 plat also shows that the offensive brick fence, partially demolished by Mrs. Agnew, is not located on Sussex property.) Agnew's recorded deed and plat, showing that she has title to the property upon which the offensive brick fence is located, are also in the record. Therefore, the record will show that the Sussex had ample notice of the wall demolition based on Agnew's 2001 plat and the Sussex 2008 plat that corroborates Agnew's ownership of the property.

3) Agnew's exhibits will show that the Sussex did not warn Agnew that she would trespass if she demolished the wall, did not respond to Agnew's notification, and did not forbid her from planting a

garden upon her own property where the wall had been removed on her side of the property line.

Code § 18.1--173 provides, in pertinent part: 'If any person shall without authority of law go upon or remain upon the building or premises of another . . . after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be deemed guilty of a misdemeanor . . ..' This statute is applicable to public as well as to private property. Johnson v. Commonwealth, 212 Va. 579, 186 S.E.2d 53, cert. denied, 407 U.S. 925, 92 S.Ct. 2458, 32 L.Ed.2d 812 (1972)

. Listed Agnew/Sussex correspondence shows that Agnew advised the Sussex in April, 2008 that she had a demolition permit from the City acknowledging her possession and intent to remove part of the offending brick fence from her property. The Sussex did not respond with a warning claim of trespass. At the time part of the offensive brick fence was demolished in June, 2008, the Sussex did not respond with a warning claim of trespass. Until this case was filed in 2009, the Sussex had made no other warning claim of trespass. Moreover, Agnew's evidence will show that no tenant residing in the Sussex has claimed that she either trespassed or converted Sussex property until this case was filed in 2008. Therefore, the Sussex can show no warning claim of trespass orally or in writing forbidding Agnew from demolishing part of the offending wall.

CONCLUSION

Agnew must be given due process by permitting her to introduce at trial her listed exhibits showing that the Sussex pleadings are fatally flawed; to present evidence connecting and explaining exhibits

already in the record proving that Agnew did not trespass when she removed an offending brick wall from her property; to prove that she provided fair notice to the Sussex and received no responsive warning of trespass; that no one claimed trespass or conversion until this case was filed - long after the fact. Finally, Sussex trespass and conversion issues cannot mature until the appeal of the interlocutory Order is heard.

Respectfully submitted,

/S/

Marian K. Agnew, pro se
1820 Park Ave. #2
Richmond, VA 23220
(804) 359-8248

CERTIFICATE OF SERVICE

I, Marian K. Agnew, hereby certify that DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE was on this 12th day of January, 2010, faxed at (804) 697-1339, and sent electronically to Opposing Counsel and Joshua D. Heslinga, P.O Box 1122, Richmond VA 23219-1122, Counsel for Plaintiff Sussex Condominium Association.

Marian K. Agnew

Tax ID - W0000861085

CITY OF RICHMOND -
OFFICE OF THE ASSESSOR OF REAL ESTATE

OPPOSING COUNSEL	Unit 1, 1814 Park Avenue, Richmond Va 23220
01/01/07	$388,000
01/01/08	$419,000
01/01/200	$419,000
01/01/2009 Office review	$318,000
09/03/08 sale from Burgess to opposing counsel	$250,000

City of Richmond
Office of the Assessor of Real Estate
Regina Randolph, Supervisor
/S/

189 (3)

No. 10-1274

Supreme Court, U.S.
FILED
JUN 27 2011
OFFICE OF THE CLERK

In the

Supreme Court of the United States

MARIAN K. AGNEW,

Petitioner,

v.

THE SUSSEX CONDOMINIUM UNIT OWNERS ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari To the Supreme Court of the State of Virginia

PETITION FOR A REHEARING

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Petitioner, Marian K. Agnew, seeks rehearing of this Court's May 31, 2011, Order Denying her Petition for a Writ of Certiorari pursuant to Rule 44.2 of the Supreme Court Rules.[1] Rehearing and a grant of certiorari are warranted in light of other substantial grounds not previously presented.

INTRODUCTION

Mrs. Agnew's certiorari petition argued that the Virginia Statute of Limitations ("the Statute") for adverse possession[2] empowered the Circuit Court to summarily decide, without taking her evidence, that her property had been conveyed to the Respondent eight years before she purchased it, fifteen-years after the Respondent had obtained permission from her predecessor to build a Brick Wall between their properties on his (now Mrs. Agnew's) property by deliberately misrepresenting the location of the common boundary line. She asserts here that the equal protection and substantive due process mandates of the 14th Amendment supersede and void not only the Virginia Statute but also similar vague and

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[1] Under Rule 44.2, this Petition for Rehearing is timely.

[2] Virginia Code § 8.01-236. Limitation of entry on or action for land. No person shall make an entry on, or bring an action to recover, any land unless within fifteen years next after the time at which the right to make such entry or bring such action shall have first accrued to such person or to some other person through whom he claims;

ambiguous statutes in other States that mechanically convey titled property to similar squatters.

In support, she submits additional economic studies showing that these mechanical statutes that violate equal protection also increase the negative economic impact of adverse possession on prospective economic development within each State. They have created unequal risks and costs for property owners by both escalating the cost of repelling squatters and destabilizing conventional real property conveyances, precisely the discrimination that the equal protection of the 14th Amendment was designed to prevent.

As urban land values have skyrocketed, economists have been consulted to examine whether the time-honored practice of adverse possession has become a risky and costly threat to expectations of profit; or is still the least expensive and expedient way to settle title disputes. To assess those risks and costs, several economic studies have evaluated alternative lengths for state statutes of limitation ("Statutes).[3] Although the study examined below[4] does not reach the ultimate conclusion that all such statutes are obsolete, irrationally related to economic

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3 Baker, Miceli, Sirmans, Turnbull, *Property Rights by Squatting: Land Ownership Risk and Adverse Possession Statutes*, Economic Development Quarterly, August, 2001, 360-370.

[4] Papageorgiou, Turnbull, *Economic Development and Property Rights: Time Limits on Land Ownership*, Economic Development Quarterly, August 2005, 271-283.

needs and inherently discriminatory, its analysis suggests that the uniform length of all state Statutes since enacted in the 18th Century, remains a major deterrent to maximizing profit from land development today.[5]

A. Anachronistic, Arbitrary, Vague and Ambiguous, One-Size-Fits-All-Time-Lapse State Statutes of Limitation for Adverse Possession Generate Unequal Risks and Costs Negatively Affecting Economic Development.

Adverse possession, also called "theft by squatters," is state action that prohibits a property owner from ejecting a trespasser upon tolling of the Statute, thereby taking his property without compensation. Addressing its invisible operation on property values, economists here evaluate the notion that the length of the Statutes has destabilized property values for both urban and rural property owners from past and future squatter's claims, thereby failing to accommodate landowners' expectations of profitability. "Well-defined property rights enhance efficiency and liquidity in asset markets, thereby promoting efficient economic development."

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[5] The study does not address "tacking," the practice of computing statutory ownership by consecutive possession of property.

"Conflicting ownership claims profoundly affect the pace and pattern of economic investment." "The Statutes of Limitation establish a time limit to challenge, or protect from challenge, an individual's claim of ownership." Since the life span of land exceeds that of any individual, investors want to know how long claims against property title should be honored. "In the 18th Century, when these statutes were imported from English law, state legislatures responded to the economic demands of owners of developed or developable land to enact shorter or longer statute lengths. Political power in the agricultural, forestry, and other nonurban sectors of the economy produced a longer prevailing statute of limitations. In urbanized sectors, prevailing statutes on claims to land title are shorter."

> "In the United States, for example, changes in the state statutes have been few and infrequent even though the nation has enjoyed a rapid rate of technological growth and unprecedented change in its economy over the past 85 years. [Earlier economic studies] identify only nine U.S. states that have changed their statute lengths from 1916 to 1999."

Generally, the longer statutes of original colonies reflect rural interests and those with shorter statutes were enacted as states were admitted to the Union. Statutes enacted later attempt to ascertain proof of honest possession, primarily by color of title and

proof of tax payments. They vary from sixty (60) years in New Jersey to two (2) years in Arizona. The Texas statute is three (3) to fifteen (15) years, depending upon circumstances. Hawaii, a land court registration state that invalidates adverse possession claims, is twenty (20).

Economic analyses also reveal that it is not possible to impose a uniform statute length without arbitrarily redistributing wealth from one sector to another:

> "Owners of land in central cities or older suburbs benefit from a shorter statute length, whereas owners of land farther out toward the fringe of urban areas benefit from a longer statute. Therefore, the single statute length within an economically diverse state cannot fulfill the needs of all types of property owners at all times."

The study suggests that statute length affects the profitability for redevelopment of declining urban cores in U.S. cities, like the Washington Metropolitan Area. There, a significant part of the economic development process is tied to shifting land from agricultural, forestry, or other nonurban uses to the urban sector or the transfer of land from one urban use, single family lots, to another more highly valued use, townhouses, apartments, or shopping centers. Presumptively, the bare-bones Virginia Statute chal-

lenged here is original because it protects owners of record from squatters in possession by limiting their eviction "right of entry," to fifteen years. Both Maryland and the District impose stricter restrictions on adverse possession takings, notably proof of tax payment.

The study also shows that the length of the Virginia, D.C., and Maryland Statutes does not maximize value for land in the interior of an urban area. It predicts that those statutes should be shorter than statutes for land peripherally further away because of rental value.

> "For any two different parcels of land, the land with the larger future net rent [should have] a shorter optimal statute of limitations than [should] land with a smaller future net rent." "economically pressed areas of metropolitan regions in the United States cannot generally expect to enjoy the statute lengths that would most enhance the market value of redeveloped property."

The study also predicts that changing a state statute of limitations, will yield a capricious reallocation of wealth in the form of capital gains and losses among property owners, as the values of their property adjust to the new statute length.

> "The difficulty here is that frequent changes create uncertainty about the future course of the property rights with the ensuing effect of slowing economic development. Even giving the power of setting the statute to local governments can lead to frequent changes that, regardless of motivation, create property rights uncertainty, even for a developed country like the United States." Therefore, an effective property rights regime requires that any fundamental changes in the nature or definition of those rights be infrequent."
>
> "Easing transitions from one statute length to another using "hold harmless" or grandfather clauses may not ensure that such transitional periods are efficient." "Recent studies by Innes (1997) and Turnbull (2002) are suggestive on this point; they show how uncertainty in the exercise of eminent domain or land-use regulations by local governments can lead to inefficient investment in capital improvements and development timing, even when property owners are protected by transitional compensation schemes."

(*See for example*) (*Penn Central Transp. Co. v. New York City*, 438 US 104 (1978) (eminent domain).

The study concludes that no statute length will have equal benefits for all property owners: "No single special-purpose modification of property rights for

developing urban land will suit all neighborhoods in need of redevelopment." All state Statutes of Limitation have unequal risks and rewards, failing to provide protection for owners of various kinds of property. Even if localized,

> "The main implication. . . of the study is that, even at the city or county level, a given statute of limitations cannot fully meet the needs of all of the various types of property contained within the jurisdiction." "There is, therefore, no way to determine the optimal length of a statute that did not prejudice owners of various kinds of land."

All property owners are at put at risk because, applied statewide, the Statutes are irrationally discriminatory. Put simply no uniform state Statute of Limitations can provide equal protection required by the 14th Amendment.

B. State Statutes of Limitation Demand Constitutional Review Because They Are Obviously Arbitrary and Patently Without Rational Relationship To Current Commercial Real Property Development.

This Court in *McGowan v. Maryland*, 366 U.S. 420 (1961), mirrored in this case on all fours, examined state statutory restrictions on Sunday sales, "Sunday closing laws," were also imported from Eng-

lish common law in the 18th Century. Originally intended to establish both religious observance and a day of rest by restricting Sunday commercial activity, they remained as labor regulation long after their religious restrictions were disestablished by the First Amendment. Business interests have challenged their allegedly unfair impact on local commerce on 14th Amendment equal protection and due process grounds for many years.

Even though these Maryland Sunday laws were not verbatim re-enactments of their religiously oriented antecedents, "legislation in forty-nine of the fifty States still illegalized on Sunday some form of conduct lawful if performed on weekdays," *McGowan*, Id. at 449, 496, In several States only one or a few activities were banned—the sale of alcoholic beverages, hunting, barbering, pawn brokering, trading in automobiles; but thirty-four jurisdictions broadly banned Sunday labor, selling or keeping open for sale, etc. *McGowan*, Id. at 495-496. "Throughout the years, state legislatures had modified, deleted from and added to their Sunday statutes." McGowan, Id. at 435.

By contrast, the vague Virginia Statute that initiates adverse possession but never refers to it, has presumptively remained essentially unchanged since its enactment. (*see* fn. no. 2) Its provisions lack all rational foundation because they are not related to citizen needs for stable and predictable land owner-

ship. In fact, they create conflict between the putative owner and the claimant, as shown in this case. The Statute simply precludes "no person," including the owner of record, from "entry upon land" to "bring an action to recover" after fifteen years. It clearly does not meet the standards set by the *McGowan* Court for constitutionally permissible state regulation of commercial activity.

> "The Constitution is satisfied if a legislature responds to the practical living facts with which it deals." "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 "It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. See *Goesaert* v. *Cleary*, 335 U. S. 464. And what degree of uniformity reason demands of a statute is, of course, a function of the complexity of the needs which the statute seeks to accommodate." McGowan, Id. at 524.

It is clear that in fashioning legislative remedies to fit specific needs, "The range of the State's discretion is large." *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 501

> "This is especially so where, by the nature of its subject, regulation must take account of traditional and prevailing local customs.

> See *Kotch v. Board of River Port Pilot Comm'rs*, 330 U. S. 552.. " "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical, Inc.*, 348 U. S. 483, 489.

> The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary; and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of lack of rationality. McGowan, Id. at 534, 535

The *McGowan* Court held that Sunday statutes were constitutional: "As expressions of state policy, they must be deemed as contemporary as their latest-enacted exceptions in favor of moving pictures or severer bans of Sunday motor vehicle trading" They reflected a widely felt present-day need related to local circumstances. "The notion that. . . the Mary-

land statute lacks all rational foundation is baseless. The exceptions relate to products and services . . . reasonably necessary to the physical and mental health of the people or to their recreation and relaxation on a day of repose. *McGowan,* Id. at 537.

This Court must find that uniform state statutes cannot possibly meet the McGowan standards primarily because they have no schemes of classification. They are obviously arbitrary and discriminatory, so patently without reason that no conceivable situation of fact can be found to justify them. They do not reasonably protect property owners' needs, "a peculiar and changing set of local circumstances and local traditions." They are irrationally arbitrary, applying indiscriminately to both urban and rural land, simply transferring ownership to possessors when they expire. The statutes are, therefore, patently incapable of any justification whatsoever rationally to determine property ownership because they subvert conventional conveyancing and recording procedure and in so doing, create unstable expectations of profitibility in land transactions.

The McGowan analysis clearly demonstrates that, like all other state Statutes of Limitation conveying millions of dollars worth of property by adverse possession without compensation every year, the Virginia Statute of Limitations must be given at least the same constitutional scrutiny accorded the

McGowan Maryland defendants who were fined $5.00 for selling notebooks and staplers on Sunday.

C. All Statutes of Limitation Must Be Declared Unconstitutional Because They Destabilize Property Law.

Both the vestigial 18th Century Virginia Statute of Limitation for Adverse Possession and the Maryland Sunday closing statutes share common origins in English common law. However, the Maryland statutes passed constitutional scrutiny because they had a rational foundation, "providing exceptions relating to products and services which a legislature could reasonably find necessary to the physical and mental health of the people or to their recreation and relaxation on a day of repose." *McGowan,* Id. at 536.

As shown by the economic study reviewed above, there is no such rational basis for the economic destabilizing effect of the statutes of limitation for adverse possession that have failed since their enactment to acknowledge the development/property-rights nexus between time limitations and pressing ownership claims for land. The Statutes should have been repealed soon after the 14th Amendment was ratified in 1868, as were the restraints on religious practice when Virginia legislators repealed all laws deemed inconsistent with the Bill for Establishing Religious Freedom as "a true exposition of the principles of the Bill of Rights and Constitution." (Nota-

bly, "The Sunday law of 1786 [preventing labor on Sunday] was not among those repealed." *McGowan*, Id. at 495.)

That omission now demands constitutional review. The economists ask, "Why not allow local governments to obtain special exclusions for land within their jurisdictions?" There has been some limited experimentation in the United States with local variation in property rights regimes. For example, a handful of locales have employed 'registration' title rules instead of the more common 'recording' rules used throughout most of the United States. The relevant difference between these two title systems is that the registration system in effect eliminates the risk of many prior claims as well as those of potential future squatters. This use of the registration title represents a local variation in the state's statute of limitations for exercising such claims. "Although limited, the U.S. experience suggests that local variations in the statute of limitations (perhaps at the county level) are feasible."

CONCLUSION

Your Petitioner respectfully requests review of her Petition for Rehearing that presents economic grounds not previously presented for remand, reversal and repeal of not only the Virginia Statute but also all other state Statutes of Limitation for adverse possession that fail to protect property rights equally

by providing the substantive due process mandated by the 14th Amendment to the U.S. Constitution.

Respectfully Submitted,

Marian K. Agnew, *pro se* VSB #20503 (retired)
1820 Park Ave. Apt. 2
Richmond, Virginia 23220

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this Petition for Rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

Marian K. Agnew